

## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. V A Refs.

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

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## Research References

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  [26](#), [28\(1\)](#), [28\(2\)](#), [29\(1\)](#), [31](#), [33\(1\)](#), [33\(2\)](#), [34\(1\)](#)

### A.L.R. Library

A.L.R. Index, Counterclaim, Recoupment, and Setoff

A.L.R. Index, Pleadings

West's A.L.R. Digest, [Set-off and Counterclaim](#)  [26](#), [28\(1\)](#), [28\(2\)](#), [29\(1\)](#), [31](#), [33\(1\)](#), [33\(2\)](#), [34\(1\)](#)

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 66

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

###### 1. Nontax Claims by and Against State, Local, and Foreign Governments

## § 66. Claim by or against state

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### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

While a state, as a plaintiff, generally subjects itself to the defendant's claims in the same way as any other litigant,<sup>1</sup> the defendant in an action brought by a state normally cannot maintain a setoff or counterclaim founded on an independent claim, unless authorized by statute to do so.<sup>2</sup> To permit a defendant to counter the state's claim with its own, unauthorized claim would contravene the rule that the state cannot be sued without its consent,<sup>3</sup> at least in those jurisdictions which have not abrogated the doctrine of sovereign immunity. It has been found, however, that a defendant may, as a defense against the state's claim, assert a setoff or counterclaim arising out of or connected with the same acts or transaction that the state sues on, even absent an explicit statutory waiver or judicial abrogation of the doctrine of sovereign immunity.<sup>4</sup>

The state's act of filing suit in either its own courts or in those of a sister state may serve as a waiver of sovereign immunity, at least as to the issues growing out of the claim sued on. In such circumstances, the defendant is entitled to plead and prove any available defense other than limitations.<sup>5</sup> A state also waives its immunity from a counterclaim arising from the same event that is the subject of the state's action by bringing suit in a federal court. This waiver is limited, however, to a counterclaim asserted defensively by way of recoupment in order to defeat or diminish the state's recovery; it does not encompass a counterclaim filed for the purpose of obtaining an affirmative judgment against the state.<sup>6</sup> Note, there is also authority allowing affirmative relief against a state up to the amount of the state's claim.<sup>7</sup>

### Observation:

Many states require a claimant to file a notice of the existence of a claim, and the failure to file such a notice bars the assertion of the claim as a counterclaim in the state's action.<sup>8</sup>

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#### Footnotes

- 1 [State v. Young](#), 238 Ind. 452, 151 N.E.2d 697 (1958).
- 2 [Harsh California Corp. v. San Bernardino County, Cal.](#), 262 F.2d 626 (9th Cir. 1958); [State v. Gill](#), 259 Ala. 177, 66 So. 2d 141 (1953); [State ex rel. State Highway Commission of N.M. v. Town of Grants](#), 1961-NMSC-133, 69 N.M. 145, 364 P.2d 853 (1961).
- 3 [Harsh California Corp. v. San Bernardino County, Cal.](#), 262 F.2d 626 (9th Cir. 1958).
- 4 [The Fort Fetterman v. South Carolina State Highway Dept.](#), 261 F.2d 563 (4th Cir. 1958), [on reh'g](#), 268 F.2d 27 (4th Cir. 1959); [State v. Martin](#), 347 S.W.2d 809 (Tex. Civ. App. Austin 1961), [writ refused n.r.e.](#), (Oct. 11, 1961); [State, by Davis, v. Ruthbell Coal Co.](#), 133 W. Va. 319, 56 S.E.2d 549 (1949).
- 5 [Com. of Mass. v. Davis](#), 160 S.W.2d 543 (Tex. Civ. App. Austin 1942), [decision aff'd in part, rev'd in part on other grounds](#), 140 Tex. 398, 168 S.W.2d 216 (1942).
- 6 [Burgess v. M/V Tamano](#), 382 F. Supp. 351 (D. Me. 1974).
- 7 [Department of Transp. of State of Ill. v. American Commercial Lines, Inc.](#), 350 F. Supp. 835 (N.D. Ill. 1972).
- 8 [Department of Transp. v. PSC Resources, Inc.](#), 159 N.J. Super. 154, 387 A.2d 393 (Law Div. 1978).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 67

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

###### 1. Nontax Claims by and Against State, Local, and Foreign Governments

## § 67. Claim by or against municipality or other local agency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

A municipal corporation or other local agency exercising governmental functions is entitled to assert a setoff or counterclaim to the same extent as a natural person.<sup>1</sup> Conversely, a municipality or other political subdivision that brings a claim is subject to counterclaims, setoffs, and recoupments to the same extent as a private litigant.<sup>2</sup> A city or municipality may be sued for its contractual defaults, for the torts of its officers, agents, and employees, and for other claims,<sup>3</sup> as long as the claim against the government is not founded on the performance of a purely governmental or discretionary function.<sup>4</sup>

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### Footnotes

- <sup>1</sup> [Hillhouse v. City of Kansas City](#), 221 Kan. 369, 559 P.2d 1148 (1977); [Kentucky Center for the Arts Corp. v. Berns](#), 801 S.W.2d 327 (Ky. 1990).
- <sup>2</sup> [Craig v. City of Macon](#), 543 S.W.2d 772 (Mo. 1976).
- <sup>3</sup> [Gorman v. Adams](#), 259 Iowa 75, 143 N.W.2d 648 (1966); [Hicks v. State](#), 1975-NMSC-056, 88 N.M. 588, 544 P.2d 1153 (1975).
- <sup>4</sup> [Sangre de Cristo Development Corp., Inc. v. City of Santa Fe](#), 1972-NMSC-076, 84 N.M. 343, 503 P.2d 323 (1972); [Landeros v. City of El Paso](#), 804 S.W.2d 188 (Tex. App. El Paso 1991), writ denied, (June 19, 1991).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 68

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 1. Nontax Claims by and Against State, Local, and Foreign Governments

## § 68. Claim against foreign state

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

### A.L.R. Library

[Modern status of the rules as to immunity of foreign sovereign from suit in federal or state courts, 25 A.L.R.3d 322](#)

A foreign state that brings or intervenes in an action in a federal or state court will not be accorded immunity with respect to any counterclaim:<sup>1</sup>

- for which a foreign state would not be entitled to immunity under federal law, if the claim had been brought in a separate action against the foreign state
- arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state
- to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state

**Observation:**

The counterclaim statute is meant to prevent a foreign sovereign from using United States courts to assert claims against United States citizens, while shielding itself from counterclaims by claiming sovereign immunity.<sup>2</sup>

Under some circumstances, a counterclaiming party may have affirmative relief in an amount exceeding the claim made by the foreign state.<sup>3</sup>

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**Footnotes**

- 1                   28 U.S.C.A. § 1607, referring to 28 U.S.C.A. §§ 1605, 1605A.
- 2                   National City Bank of New York v. Republic of China, 348 U.S. 356, 75 S. Ct. 423, 99 L. Ed. 389 (1955);  
Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 594 F. Supp. 1553 (S.D. N.Y. 1984).
- 3                   Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 69

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 2. Setoffs of or Against Nonfederal Taxes or Assessments

## § 69. Setoff by government of taxes due from plaintiff

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  33(1), 33(2)

When sued, a municipality cannot set off taxes due it from the plaintiff, since the municipality has no existing cause of action on which to institute its own suit. The municipality may enforce payment of a tax debt only by particular statutory methods.<sup>1</sup>

A state cannot set off the unpaid balance of a direct tax apportioned to the state by an act of Congress against demands of the state against the United States arising under acts of Congress.<sup>2</sup>

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### Footnotes

<sup>1</sup> [Hibbard v. Clark](#), 56 N.H. 155, 1875 WL 4824 (1875).

<sup>2</sup> [U.S. v. State of Louisiana](#), 123 U.S. 32, 8 S. Ct. 17, 31 L. Ed. 69 (1887).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 70

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#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 2. Setoffs of or Against Nonfederal Taxes or Assessments

## § 70. Setoff of claim against taxes due

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  33(1), 33(2)

On public policy grounds, a setoff is generally inadmissible against demands for taxes levied for general or local governmental purposes, in the absence of a statute authorizing the setoff.<sup>1</sup> Taxes or license fees illegally exacted or erroneously paid may not be the subject of a setoff against a valid tax or license fee.<sup>2</sup> In the absence of a statute to the contrary, overpaid taxes may not be set off against taxes levied in subsequent years, regardless of whether the overpayment was voluntary, by mistake, or coerced. Furthermore, unless authorized by statute, a taxpayer who paid a tax deficiency penalty is not entitled to setoff relief if the taxpayer fails to pay some taxes and overpays others.<sup>3</sup> In the absence of a right of action for the recovery of taxes paid under protest, there can be no setoff of those taxes against other taxes.<sup>4</sup>

It has also been found that illegally exacted taxes may be set off against valid taxes, if both were paid or due for the same reporting period.<sup>5</sup> Furthermore, if a tax is exacted for the same period under two different statutes, on the erroneous theory that the later statute kept in force the earlier one so as to cover that period, the taxpayer is entitled to credit against the valid tax for the amount of money paid on the invalid one.<sup>6</sup>

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#### Footnotes

- <sup>1</sup> [Baylen St. Wharf Co. v. City of Pensacola](#), 39 So. 2d 66 (Fla. 1949); [City of New York v. Feit](#), 200 Misc. 998, 110 N.Y.S.2d 425 (Sup 1951); [Goldstein v. School Dist. of Pittsburgh](#), 170 Pa. Super. 451, 87 A.2d 76 (1952), order aff'd, 372 Pa. 188, 93 A.2d 243 (1952); [State v. Humble Oil & Refining Co.](#), 141 Tex. 40, 169 S.W.2d 707 (1943).



- 2                   Klamath Irr. Dist. v. Carlson, 176 Or. 336, 157 P.2d 514 (1945); State v. Humble Oil & Refining Co., 141  
Tex. 40, 169 S.W.2d 707 (1943).
- 3                   Combustion Engineering Co. v. McFarland, 209 Tenn. 75, 349 S.W.2d 138 (1961).
- 4                   In re Bush Terminal Co., 93 F.2d 661 (C.C.A. 2d Cir. 1938).
- 5                   Dupler's Art Furs v. State Tax Commission, 108 Utah 513, 161 P.2d 788, 160 A.L.R. 1417 (1945).
- 6                   Gulf Refining Co. of Louisiana v. McFarland, 157 La. 713, 103 So. 17, 41 A.L.R. 1106 (1925).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 71

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#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 2. Setoffs of or Against Nonfederal Taxes or Assessments

## § 71. Claim against assessment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  28(1), 28(2), 29(1), 33(1), 33(2), 34(1)

Generally, setoffs and counterclaims are not available against special and local assessments.<sup>1</sup> If a setoff or counterclaim in an action to enforce an assessment is allowed, however, the assessment is the transaction out of which the cause of action arises, and the defendant is authorized to set up a counterclaim.<sup>2</sup> In some jurisdictions, if a contractor seeks to enforce a statutory lien on property for the construction of a street improvement, the property holder may set off a demand against the contractor individually, since such a setoff does not interfere with the exercise of governmental power or the progress of the improvement.<sup>3</sup> It has been found, however, that a claim for compensation for the taking or the invasion of property in the construction of a sewer cannot be made in a suit by a contractor to enforce a lien for the improvement, if the contractor did the work in accordance with the plans and ordinances of the city.<sup>4</sup>

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#### Footnotes

- 1 [Dawson v. Hipkind](#), 173 Ind. 216, 89 N.E. 863 (1909); [Hedge v. City of Des Moines](#), 141 Iowa 4, 119 N.W. 276 (1909).
- 2 [Engbreetsen v. Gay](#), 158 Cal. 27, 109 P. 879 (1910).
- 3 [Board of Councilmen of City of Frankfort v. Brislan](#), 126 Ky. 477, 31 Ky. L. Rptr. 867, 104 S.W. 311 (1907).
- 4 [Forester v. Coombs Land Co.](#), 277 Ky. 279, 126 S.W.2d 433 (1939).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 72

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 3. Claims by or Against Federal Government

## § 72. Claim by federal government

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

Generally, the United States may set off its claims against those who assert claims against the United States.<sup>1</sup> While a setoff by the United States requires no specific statutory authorization,<sup>2</sup> federal law gives district courts and the United States Court of Federal Claims concurrent jurisdiction of any federal setoff, counterclaim, or other claim or demand on the part of the United States against any plaintiff that commences an action.<sup>3</sup> Upon the trial of any suit in the United States Court of Federal Claims in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making a claim against the United States, the court will hear and determine such claim or demand both for and against the United States and the plaintiff. If upon the whole case it finds that the plaintiff is indebted to the United States, it will render judgment to that effect, and such judgment will be final and reviewable.<sup>4</sup> The law thus gives the federal government full use of the power to allege counterclaims.<sup>5</sup> Note, the United States may maintain a counterclaim in the United States Court of Federal Claims without regard to the success or failure of the claimant's primary action.<sup>6</sup>

The federal government's right of setoff is not affected by an assignment of the claim to one who sues the government on it.<sup>7</sup> The United States can also set off the amount that the claimant owes to the federal government on another obligation.<sup>8</sup> When sued for additional money allegedly due a claimant, the United States can counterclaim for money already paid out, if the payments were induced by fraudulent statements.<sup>9</sup>

**Observation:**

In the interest of efficient adjudication, the government may be required to interpose counterclaims for nonmonetary relief.<sup>10</sup>

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Footnotes

- 1 [Dunn & Black, P.S. v. U.S.](#), 492 F.3d 1084 (9th Cir. 2007); [Industrial Bank, N.A. v. U.S.](#), 583 F. Supp. 2d 44 (D.D.C. 2008); [U.S. v. Peterson](#), 738 F. Supp. 2d 869 (C.D. Ill. 2010).
- 2 [U.S. v. New York, N.H. & H.R. Co.](#), 236 F.2d 101 (1st Cir. 1956), judgment rev'd on other grounds, 355 U.S. 253, 78 S. Ct. 212, 2 L. Ed. 2d 247 (1957).
- 3 28 U.S.C.A. § 1346(c).
- 4 28 U.S.C.A. § 2508.
- 5 [Scott v. U.S.](#), 173 Ct. Cl. 650, 354 F.2d 292, 9 Fed. R. Serv. 2d 13,212, Case 1 (1965) (construing 28 U.S.C.A. § 2508).
- 6 [U.S. v. Buiges](#), 524 F. Supp. 1288 (S.D. N.Y. 1981).
- 7 [South Side Bank & Trust Co. v. U.S.](#), 221 F.2d 813 (7th Cir. 1955).
- 8 [U.S. v. Munsey Trust Co. of Washington, D.C.](#), 108 Ct. Cl. 765, 332 U.S. 234, 67 S. Ct. 1599, 91 L. Ed. 2022 (1947).
- 9 [United States v. Silliman](#), 167 F.2d 607 (C.C.A. 3d Cir. 1948).
- 10 [Pennzoil Co. v. Department of Energy](#), 480 F. Supp. 1126, 29 Fed. R. Serv. 2d 256 (D. Del. 1979).  
As to compulsory counterclaims, generally, see § 3.

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 73

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

#### 3. Claims by or Against Federal Government

### § 73. Claim by federal government—Setoff against tax refund

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  28(1), 33(1)

If a plaintiff institutes a suit for a tax refund, the court may acquire jurisdiction to entertain a defense of setoff on account of other indebtedness owed by the taxpayer; in such circumstances, the claim and counterclaim arise out of the same transaction or series of transactions.<sup>1</sup> The court may give the government judgment in excess of the tax refund owing to the taxpayer and thereby extinguish the claim.<sup>2</sup> The government may also maintain a claim for a setoff against a refund suit, in order to recover excess depreciation claimed by the taxpayer.<sup>3</sup>

#### Observation:

The ruling permitting the Internal Revenue Service to set off a refund against a tax claim does not interfere with a Chapter 13 debtor's right to an unencumbered fresh start, where the debtor's tax refund is sufficiently rooted in his or her prepetition past, and the tax refund is not weekly or other periodic income required by the debtor, as a wage earner, for his or her basic support.<sup>4</sup>

Footnotes

- 1 [Crane v. U.S.](#), 73 Ct. Cl. 677, 55 F.2d 734 (1932).  
The application of the doctrine of recoupment is limited in federal tax cases to circumstances in which offsetting claims arise out of a single taxable event. [U.S. v. Peterson](#), 738 F. Supp. 2d 869 (C.D. Ill. 2010).
- 2 [Wooton v. U.S.](#), 114 Ct. Cl. 608, 86 F. Supp. 143 (1949).
- 3 [Americold Corp. v. U.S.](#), 28 Fed. Cl. 747 (1993).  
A taxpayer has been permitted to maintain claims otherwise barred by limitations periods, as offsets to the government's claimed offsets. [Union Pacific R. Co. v. U.S.](#), 182 Ct. Cl. 103, 389 F.2d 437 (1968).
- 4 [In re Glenn](#), 207 B.R. 418 (E.D. Pa. 1997).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 74

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 3. Claims by or Against Federal Government

## § 74. Claim against federal government

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### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

Pursuant to the Federal Rules of Civil Procedure, the federal counterclaim rules do not expand the right to assert a counterclaim, or to claim a credit, against the United States or a federal officer or agency.<sup>1</sup> Thus, a defendant may counterclaim against the United States to the extent that the United States has surrendered sovereign immunity by law,<sup>2</sup> and the claimant may not maintain an action exceeding that limit.<sup>3</sup> Since a counterclaim may not be brought against the United States without its consent,<sup>4</sup> the court must inquire whether the United States has waived its sovereign immunity as to the claims that are the subject of the defendant's counterclaims.<sup>5</sup> The party who institutes a claim against the United States through an original complaint or a counterclaim must show that a federal statute authorizes the court to entertain the specific claim.<sup>6</sup>

Some cases consider that the federal statute<sup>7</sup> permitting claims against the United States in the district courts and the United States Court of Federal Claims does not permit the recovery of demands against the United States on counterclaims.<sup>8</sup> Other cases, however, find that governmental immunity is waived as to counterclaims that could by statute be asserted as original actions,<sup>9</sup> and furthermore that a counterclaim may be asserted if it arises out of the same contract as that on which the primary claim is based and does not exceed a certain sum.<sup>10</sup> Under the latter view, the statute should be interpreted from a practical rather than from a technical standpoint, and if no substantive rights are at stake, the only question is whether litigation will be disposed of expeditiously.<sup>11</sup>

By instituting a civil action, the United States subjects itself to a setoff<sup>12</sup> or recoupment claim that arises out of the same transaction or occurrence as the original claim and seeks to reduce or defeat the government's recovery, and therefore such a

claim against the United States does not require a statutory waiver of sovereign immunity.<sup>13</sup> However, this principle does not warrant an affirmative judgment against the United States, which still requires an independent waiver of immunity.<sup>14</sup>

**Observation:**

The setoff that may be asserted against a sovereign is in reality a claimed recoupment and is in the nature of a defense arising out of some feature of the transaction on which the sovereign's action is grounded. If the claimed setoff is based on matter unrelated to the primary claim, it is the equivalent of an independent suit against the sovereign, which may not be sued without its consent.<sup>15</sup>

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**Footnotes**

- 1 Fed. R. Civ. P. 13(d).
- 2 In re Southern Scrap Material Co., L.L.C., 713 F. Supp. 2d 568 (E.D. La. 2010).
- 3 U.S. v. Levering, 446 F. Supp. 977 (D. Del. 1978).
- 4 U.S. v. An Article of Food Consisting of Cartons of Swordfish, 395 F. Supp. 1184 (S.D. N.Y. 1975).
- 5 U.S. v. Waylyn Corp., 130 F. Supp. 783 (D.P.R. 1955), judgment aff'd, 231 F.2d 544 (1st Cir. 1956) (construing Fed. R. Civ. P. 13(d)); Jacobs v. U.S., 239 F.2d 459 (4th Cir. 1956).
- 6 U.S. v. Drinkwater, 434 F. Supp. 457 (E.D. Va. 1977).
- 7 28 U.S.C.A. § 1346(a).
- 8 U.S. v. Double Bend Mfg. Co., 114 F. Supp. 750 (S.D. N.Y. 1953); U.S. v. Boris, 122 F. Supp. 936 (E.D. Pa. 1954); U.S. v. Thompson, 150 F. Supp. 674 (N.D. W. Va. 1957).
- 9 U.S. v. Silverton, 200 F.2d 824 (1st Cir. 1952); U.S. v. Springfield, 276 F.2d 798 (5th Cir. 1960); U.S. v. King, 14 Alaska 500, 119 F. Supp. 398 (Terr. Alaska 1954).
- 10 Thompson v. U.S., 250 F.2d 43 (4th Cir. 1957).
- 11 U.S. v. Springfield, 276 F.2d 798 (5th Cir. 1960).
- 12 In re Greenstreet, Inc., 209 F.2d 660 (7th Cir. 1954); U.S. v. Boris, 122 F. Supp. 936 (E.D. Pa. 1954).
- 13 U.S. v. Taylor, 342 F. Supp. 715 (D. Kan. 1972); U.S. v. Gregory Park Section II, Inc., 373 F. Supp. 317 (D.N.J. 1974).
- 14 As to the definition of the "same contract or transaction" as used in counterclaim statutes, see § 28. Waylyn Corporation v. United States, 231 F.2d 544 (1st Cir. 1956); U.S. v. Levering, 446 F. Supp. 977 (D. Del. 1978); U.S. v. Drinkwater, 434 F. Supp. 457 (E.D. Va. 1977).
- 15 U.S. v. New York Trust Co., 75 F. Supp. 583 (S.D. N.Y. 1946).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 75

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#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 3. Claims by or Against Federal Government

## § 75. Claim against federal government—Limitations on claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

Affirmative counterclaims that are allowed against the government are subject to a dollar-amount limitation,<sup>1</sup> and district courts lack jurisdiction to enter a judgment for a larger amount.<sup>2</sup> Claims for credits in actions brought by the United States, sometimes referred to as "cross-claims," are allowed to the amount of the government's claim, if the government voluntarily sues.<sup>3</sup> A defendant may not counterclaim for any amount greater than that claimed by the United States, since this might result in an affirmative judgment against the United States, a counterclaim to which the United States has not consented.<sup>4</sup>

### Observation:

Affirmative counterclaims are also subject to substantive limitations.<sup>5</sup>

1 28 U.S.C.A. § 1346(a)(2).  
2 U.S. v. Holder, 292 F. Supp. 826 (S.D. Iowa 1968).  
3 U.S. v. Shaw, 309 U.S. 495, 60 S. Ct. 659, 84 L. Ed. 888 (1940) (construing 28 U.S.C.A. § 2406).  
4 U.S. v. Boris, 122 F. Supp. 936 (E.D. Pa. 1954).  
5 U.S. v. 255.21 Acres in Anne Arundel County, Md., 722 F. Supp. 235 (D. Md. 1989) (finding, in a  
condemnation case, that a counterclaim alleging the government's tortious injury to the property that the  
government sought to condemn was an inverse condemnation claim within the court's exclusive jurisdiction).  
If the government seeks to confiscate a taxpayer's property, the taxpayer cannot assert counterclaims against  
the Internal Revenue Service (IRS) for tortious misconduct. U.S. v. Raytown Lawnmower Co., 763 F. Supp.  
411 (W.D. Mo. 1991) (construing 28 U.S.C.A. § 1346).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 76

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 3. Claims by or Against Federal Government

## § 76. Claim against federal government—Tort claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

The Federal Tort Claims Act, which vests in district courts exclusive jurisdiction of civil actions against the United States,<sup>1</sup> is sufficiently broad to permit the assertion of a tort claim by counterclaim,<sup>2</sup> at least if both claims arise from the same event and are have the same character.<sup>3</sup> However, the court will not entertain a tort counterclaim that falls within a statutory exception specifically excluding a claim based on the failure of a federal agency or employee to exercise a discretionary function.<sup>4</sup>

### Practice Tip:

A tort counterclaimant also has to comply with all prerequisites to the maintenance of the action, such as presentment of the claim to an administrative agency before filing suit.<sup>5</sup>

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### Footnotes

1 28 U.S.C.A. § 1346(b).  
2 U.S. v. Vernon Cab Co., 125 F. Supp. 335 (D. Mass. 1954); U.S. v. Rosati, 97 F. Supp. 747 (D.N.J. 1951);  
U.S. v. New York City Omnibus Corp, 128 F. Supp. 86 (S.D. N.Y. 1955).  
3 U.S. v. Harms, 96 F. Supp. 1022 (D. Colo. 1951).  
4 U.S. v. Waylyn Corp, 130 F. Supp. 783 (D.P.R. 1955), judgment aff'd, 231 F.2d 544 (1st Cir. 1956).  
5 § 77.

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 77

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 3. Claims by or Against Federal Government

## § 77. Necessity of prior presentation and disallowance of claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

Pursuant to federal law, in an action by the United States against an individual, evidence supporting the defendant's claim for a credit will not be admitted unless he or she first proves that such claim has been disallowed, in whole or in part, by the Government Accountability Office, or that he or she has, at the time of the trial, obtained possession of vouchers not previously procurable and has been prevented from presenting such claim to the Government Accountability Office by absence from the United States or unavoidable accident.<sup>1</sup> Thus, one sued by the United States is not entitled to set off a claim against the United States, unless the claim has been presented to and disallowed by the proper officers,<sup>2</sup> or unless there is a statutory exception<sup>3</sup> or valid excuse for nonpresentation.<sup>4</sup>

### Observation:

This statute is generally thought of as a rule of evidence; it prohibits the introduction of evidence supporting the plaintiff's claim, unless the evidence is preceded by proof of presentation and disallowance. Although a failure to comply with this rule may preclude recovery, compliance need not be pleaded in order to establish jurisdiction.<sup>5</sup>

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Footnotes

- 1 28 U.S.C.A. § 2406.
- 2 U.S. v. Center, 244 F.2d 207 (5th Cir. 1957); Deseret Apartments, Inc. v. U.S., 250 F.2d 457 (10th Cir. 1957); U.S. v. Lashlee, 105 F. Supp. 184 (W.D. Ark. 1952); U.S. v. Boris, 122 F. Supp. 936 (E.D. Pa. 1954).
- 3 U.S. v. Lashlee, 105 F. Supp. 184 (W.D. Ark. 1952); U.S. v. Boris, 122 F. Supp. 936 (E.D. Pa. 1954).
- 4 U.S., for Use of Mutual Metal Mfg. Co. v. Biggs, 46 F. Supp. 8 (E.D. Ill. 1942).
- 5 U.S. v. Standard Air-Craft Corporation, 16 F.2d 307 (S.D. N.Y. 1926); U.S. v. Heard, 32 F. Supp. 39 (W.D. Va. 1940).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 78

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### A. Governments and Government Agencies

##### 3. Claims by or Against Federal Government

## § 78. Setoff against federal taxes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  28(1), 33(1), 33(2)

In accordance with the general rule that no setoff is admissible against a demand for taxes for general or local governmental purposes,<sup>1</sup> a claim for the use of a railroad during wartime could not be set off in an equitable suit by the United States to recover taxes assessed against the railroad company.<sup>2</sup> A setoff of a claim for a prior payment for erroneous taxes may be proper, however, in an action by the government for the recovery of taxes if the defendant has complied with the statutory requirement of prior presentation and disallowance of the claim.<sup>3</sup>

If a single transaction has been taxed inconsistently, either the Secretary of the Treasury or a court that has uncontested jurisdiction over a timely suit for the refund of one of the taxes in question may properly consider an equitable recoupment claim for the earlier tax paid under an inconsistent theory on the same transaction. In such cases, the court has the equitable power to consider the entire transaction, and the party litigating the tax claim may properly seek recoupment, even if an independent action for recoupment would be time barred.<sup>4</sup> Equitable recoupment does not apply, however, if the mitigating provisions of the Internal Revenue Code may provide relief,<sup>5</sup> nor will it salvage a taxpayer's claim if the taxpayer may be estopped from asserting it due to prior agreements.<sup>6</sup>

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#### Footnotes

- <sup>1</sup> § 70.
- <sup>2</sup> [U.S. v. Pacific R.R.](#), 27 F. Cas. 397, No. 15983 (C.C.E.D. Mo. 1877).
- <sup>3</sup> [Western Union R Co v. U S](#), 101 U.S. 543, 25 L. Ed. 1068, 1879 WL 16610 (1879).

As to the necessity of prior presentation and disallowance of claim, see § 77.

4 U.S. v. Dalm, 494 U.S. 596, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990).

5 Benenson v. U.S., 257 F. Supp. 101 (S.D. N.Y. 1966), judgment aff'd, 385 F.2d 26 (2d Cir. 1967).

6 U.S. v. Dalm, 494 U.S. 596, 110 S. Ct. 1361, 108 L. Ed. 2d 548 (1990); Elbo Coals, Inc. v. U.S., 588 F. Supp. 745 (E.D. Ky. 1984), decision aff'd, 763 F.2d 818 (6th Cir. 1985).

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### B. Actions by or Against Partners or Partnerships

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#) 🔑44(2)

### A.L.R. Library

A.L.R. Index, Counterclaim, Recoupment, and Setoff

A.L.R. Index, Partnerships

A.L.R. Index, Pleadings

West's A.L.R. Digest, Set-off and Counterclaim 🔑44(2)

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 79

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

#### B. Actions by or Against Partners or Partnerships

#### 1. In General

### § 79. Action against partnership; joint and several liability of partners

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

As a general rule, when a third person sues a partnership on a partnership obligation that is solely a joint debt, the partnership cannot set off claims of individual partners, but only claims of the partnership. However, when the partnership obligation is joint and several, the individual partner can plead his or her setoff.<sup>1</sup>

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#### Footnotes

1

[Karg v. Mitchek](#), 983 P.2d 21 (Colo. App. 1998).

As to the requirement of mutuality, generally, see [§ 52](#).

As to joint and several claims or demands in this regard, generally, see [§ 59](#).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 80

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### B. Actions by or Against Partners or Partnerships

###### 1. In General

### § 80. Action by or against individual partner

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

A debt due from a partnership cannot be set off against a debt due by a third person to one of the firm; the firm and its individual members are different contractors, and each is, in the eye of the law, a separate person.<sup>1</sup>

In the absence of a statute or a specific agreement between the parties, an individual partner sued for his or her individual debt or claim cannot set off a partnership claim.<sup>2</sup> However, a partner who acquires all the interests of the other partners after the dissolution of the partnership may set off a credit of the partnership against his or her obligation as an individual.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> [Bank of Ozarks v. DKK Development Co.](#), 315 Ga. App. 539, 726 S.E.2d 608 (2012), cert. denied, (Oct. 15, 2012).
- <sup>2</sup> [Gibbons v. Hansch](#), 185 Minn. 290, 240 N.W. 901, 82 A.L.R. 1027 (1932); [Esty v. Walker](#), 222 Mo. App. 619, 3 S.W.2d 744 (1927).
- <sup>3</sup> [Barrington v. Maner](#), 54 F.2d 917 (C.C.A. 5th Cir. 1932); [Advanced Living Center v. T. J. Bettles Co. of Cal.](#), 11 Ariz. App. 336, 464 P.2d 656 (Div. 1 1970).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 81

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### B. Actions by or Against Partners or Partnerships

###### 1. In General

### § 81. Action by or against surviving partner

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

A surviving partner sued on a partnership debt may set off a debt due the partner individually from the plaintiff, since there is mutuality between the plaintiff and the survivor.<sup>1</sup> However, a deceased partner's individual liability generally cannot be set off in an action on a partnership claim brought by the surviving partner.<sup>2</sup>

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#### Footnotes

- 1 [Hewitt v. Hayes](#), 204 Mass. 586, 90 N.E. 985 (1910).  
As to the requirement of mutuality, generally, see [§ 52](#).
- 2 [Edwards v. Parker](#), 88 Ala. 356, 6 So. 684 (1889).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 82

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### B. Actions by or Against Partners or Partnerships

###### 1. In General

## § 82. Action between partners or former partners

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

A partner sued on a personal note by another partner cannot set off the plaintiff's alleged liability for unpaid partnership debts for which there is no right of contribution.<sup>1</sup> Similarly, if the matters set up by counterclaim or setoff consist of mere unadjusted claims that might be the subject of an accounting between the partners, the counterclaim is improper.<sup>2</sup>

If, following the termination of the partnership, one partner sues another concerning a matter independent of the partnership, the defendant may counterclaim for items due him or her out of partnership transactions, if the items are few and simple and if there is no occasion for an equitable accounting.<sup>3</sup> Furthermore, the fact that a contract relates to a transaction unconnected to the subject of the action between the parties does not prevent the defendant from counterclaiming for the amount due him or her under the partnership agreement, if a partnership existed between the plaintiff and the defendant for a particular purpose, if the contract has been fully executed, and if no accounting is necessary because the profits have been determined.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [Brinson v. Franklin](#), 177 Ga. 727, 171 S.E. 287 (1933).
- <sup>2</sup> [Mack v. White](#), 35 Del. 289, 165 A. 150 (Super. Ct. 1933).
- <sup>3</sup> [Zimmerman v. Lehr](#), 46 N.D. 297, 176 N.W. 837, 21 A.L.R. 8 (1920).
- <sup>4</sup> [Baremore v. Selover, Bates & Co.](#), 100 Minn. 23, 110 N.W. 66 (1907) (involving a partnership agreement for the purchase and sale of certain lands and a division of the profits).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 83

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### B. Actions by or Against Partners or Partnerships

##### 2. Action by Partnership

## § 83. Defendant's claim against individual partner; generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

### A.L.R. Library

[Right of counterclaim, setoff, and the like, of defendant against partners individually, in action to enforce partnership claim, 39 A.L.R.2d 295](#)

Although there is authority to the contrary,<sup>1</sup> the defendant in an action on a partnership claim generally cannot set off an individual debt that a member of the partnership owes to the defendant.<sup>2</sup> The rule is an application of the broader principle that a private debt cannot be set off against a joint debt,<sup>3</sup> as well as the standard delineated by the Uniform Partnership Act, that one partner has no right to possess the partnership property for any purpose other than partnership purposes without the consent of his or her copartners.<sup>4</sup> The general rule against the setoff of nonpartnership debt against partnership claims applies equally to recoupment.<sup>5</sup>

A counterclaim alleging an individual indebtedness of one partner to the defendant has been allowed as a permissible counterclaim, however, in an action on a partnership claim.<sup>6</sup> A counterclaim has also been allowed against two partners suing in their individual capacity to enforce their alleged rights as joint owners of the assets of a partnership.<sup>7</sup>

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Footnotes

- 1 [Matter of Penn Cent. Transp. Co.](#), 419 F. Supp. 1376 (E.D. Pa. 1976); [Scott v. U.S.](#), 173 Ct. Cl. 650, 354 F.2d 292, 9 Fed. R. Serv. 2d 13,212, Case 1 (1965).
- 2 [Stinson v. Lanier](#), 223 Ala. 62, 134 So. 793 (1931); [Atkinson & Co. v. Hibernia Nat. Bank in New Orleans](#), 186 La. 1074, 173 So. 768 (1937); [First State Bank of Denton v. Vestal & Naugle](#), 48 S.W.2d 706 (Tex. Civ. App. Fort Worth 1932).
- 3 [Edelman v. Schwartz](#), 178 N.Y.S. 587 (Sup 1919).  
As to the mutuality of demands, generally, see §§ 52 to 60.
- 4 [Unif. Partnership Act § 25\(2\)\(a\)](#).
- 5 [Holton v. American Pastry Products Corporation](#), 274 Mass. 268, 174 N.E. 663 (1931).
- 6 [Zion v. Sentry Safety Control Corp.](#), 258 F.2d 31 (3d Cir. 1958) (construing Fed. R. Civ. P. 13).  
As to permissible counterclaims, generally, see § 4.
- 7 [Abraham v. Selig](#), 29 F. Supp. 52, 1 Fed. R. Serv. 222 (S.D. N.Y. 1939) (construing Fed. R. Civ. P. 13).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 84

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

#### B. Actions by or Against Partners or Partnerships

#### 2. Action by Partnership

### § 84. Setoff to extent of partner's interest in partnership claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

Determining a partner's interest in the money paid as partnership money may involve a settlement and winding up of the partnership affairs. The debtor being sued on a partnership claim may not force the partnership to be dissolved for the determination of the interest of each partner in each item of its property.<sup>1</sup>

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#### Footnotes

<sup>1</sup> [Hoaglin v. C.M. Henderson & Co., 119 Iowa 720, 94 N.W. 247 \(1903\).](#)

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 85

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### B. Actions by or Against Partners or Partnerships

##### 2. Action by Partnership

### § 85. Assignee's suit on partnership claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

The general rule against the setoff of an individual debt of one partner in a suit on a partnership demand applies regardless of whether the suit is brought in the name of the partnership or its assignee; pursuant to the Uniform Partnership Act, a partner's right in specific partnership property cannot be assigned except in connection with the assignment of the rights of all the partners in the same property.<sup>1</sup> If one partner acquires all the other partners' interests in the partnership and sues on a claim thereby transferred to the partner, however, the defendant may set off a debt that the plaintiff incurred while conducting the business as a sole owner.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Unif. Partnership Act § 25\(2\)\(b\).](#)

<sup>2</sup> [Carter v. Mizell, 214 Ala. 182, 106 So. 846 \(1925\).](#)

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 86

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### B. Actions by or Against Partners or Partnerships

##### 2. Action by Partnership

### § 86. Setoff between judgments; debts severally incurred by all partners

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

A judgment obtained by a partnership debtor against one of the individual partners cannot ordinarily be set off against a judgment obtained by the partnership against the debtor.<sup>1</sup> The general rule against the setoff of an individual debt applies, even though all members of the plaintiff partnership have incurred individual debts that the defendant attempts to set off against the partnership claim.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Edelman v. Schwartz](#), 178 N.Y.S. 587 (Sup 1919).

<sup>2</sup> [Denney v. Wheelwright](#), 60 Miss. 733, 1883 WL 3913 (1883).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 87

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Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

##### B. Actions by or Against Partners or Partnerships

##### 2. Action by Partnership

### § 87. Partner's agreement to permit setoff

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  44(2)

The liability of an individual partner may be set off against a partnership claim, if all partners expressly or implicitly agree to the setoff of the individual partner's liability out of partnership assets.<sup>1</sup> Note, it has been found that the mere promise of one partner that an individual claim of a defendant against the partner could be set off against a partnership claim constitutes an agreement between the partnership and the defendant that makes a setoff permissible.<sup>2</sup>

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#### Footnotes

- 1 [Stinson v. Lanier](#), 223 Ala. 62, 134 So. 793 (1931); [F.T. Hardy & Co. v. Jones Bros.](#), 13 Ga. App. 457, 79 S.E. 246 (1913); [Roth v. Ward](#), 112 N.Y.S.2d 154 (Sup 1952).
- 2 [Sloan v. McDowell](#), 71 N.C. 356, 1874 WL 2602 (1874).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. V C Refs.

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### C. Other Parties

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

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### A.L.R. Library

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A.L.R. Index, Pleadings

West's A.L.R. Digest, [Set-off and Counterclaim](#)  26, 31

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 88

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### V. Claims and Actions by or Against Particular Parties

#### C. Other Parties

## § 88. Landlord and tenant

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

Pursuant to the Uniform Residential Landlord and Tenant Act, in a landlord's action for possession based upon nonpayment of the rent, or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount he or she may recover under the rental agreement or the Act.<sup>1</sup> In an action for rent when the tenant is not in possession, the tenant may likewise counterclaim as provided above.<sup>2</sup> Thus, a tenant's counterclaim for damages can be offset against rent due.<sup>3</sup> Note, this principle applies to both residential and commercial tenancies.<sup>4</sup>

### Observation:

Both recoupment and setoff defenses in a landlord-tenant action are really nothing more than requests that the court reduce any award to the plaintiff by any sums owed to the defendant as a result of the tenancy.<sup>5</sup>

In a tenant's action to recover an unrefunded security deposit, a landlord may counterclaim for damages exceeding the amount of the deposit, even if the landlord has made a partial refund.<sup>6</sup> A judgment for damages in the landlord's favor,<sup>7</sup> or any other claim arising out of a tenant's failure to comply with either statutory duties or the terms of the agreement,<sup>8</sup> may properly be set

off against an unreturned deposit. A landlord has also been permitted to offset against a security deposit debts that the tenant owes to the landlord as a result of other transactions.<sup>9</sup>

## CUMULATIVE SUPPLEMENT

### Statutes:

Under the Revised Uniform Residential Landlord and Tenant Act, approved by the Uniform Law Commission in 2015, the provisions regarding a tenant's counterclaim are found in § 408.

## [END OF SUPPLEMENT]

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### Footnotes

- 1 Unif. Residential Landlord and Tenant Act § 4.105(a).  
A tenant's claim that a landlord had improperly exercised summary ejectment as a remedy was a compulsory counterclaim in the landlord's summary ejectment proceeding; while the landlord sought injunctive relief and the tenant sought damages as a remedy, issues of law and fact were largely the same in both actions, which were logically related and required substantially the same evidence. [Cloer v. Smith](#), 132 N.C. App. 569, 512 S.E.2d 779 (1999).
- 2 Unif. Residential Landlord and Tenant Act § 4.105(b).
- 3 [L&M Inv. Co. v. Morrison](#), 286 Or. 397, 594 P.2d 1238 (1979).
- 4 [American Nat. Bank and Trust Co. of Chicago v. K-Mart Corp.](#), 717 F.2d 394, 14 Fed. R. Evid. Serv. 124 (7th Cir. 1983); [Dayton-Hudson Corp. v. Macerich Real Estate Co.](#), 751 F.2d 219 (8th Cir. 1984); [Marini v. Ireland](#), 56 N.J. 130, 265 A.2d 526, 40 A.L.R.3d 1356 (1970).
- 5 [Shin v. Portals Confederation Corp.](#), 728 A.2d 615 (D.C. 1999).
- 6 [Whitehorn v. Lovik](#), 398 N.W.2d 851 (Iowa 1987).
- 7 [Baculis v. McDougall](#), 460 N.W.2d 186 (Iowa Ct. App. 1990).
- 8 [Burgess v. Stroud](#), 17 Kan. App. 2d 560, 840 P.2d 1206 (1992).
- 9 [In re Alchar Hardware Co., Inc.](#), 759 F.2d 867 (11th Cir. 1985).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 89

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### Counterclaim, Recoupment, and Setoff

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#### V. Claims and Actions by or Against Particular Parties

##### C. Other Parties

## § 89. Husband and wife

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  26, 31

At least one court has found that an allegation of adultery is a counterclaim that should be asserted in an action for divorce, as an avoidance of a claim by the adulterous spouse for support.<sup>1</sup> Whether a particular jurisdiction permits the assertion of such claims in a no-fault divorce or not, the general rules concerning counterclaims should apply in dissolution actions as well, in order to require the parties to wind up all their disputes in one forum to the extent possible and to disentangle the parties from each other.<sup>2</sup> A spouse's counterclaim in a dissolution action constitutes a new, independent claim for relief that precludes the dismissal of the counterclaim, despite the voluntary dismissal of the other spouse's initial petition.<sup>3</sup>

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#### Footnotes

- 1 [Oyler v. Oyler, 293 S.C. 4, 358 S.E.2d 170 \(Ct. App. 1987\).](#)
- 2 [Matter of Marriage of Jenks, 294 Or. 236, 656 P.2d 286 \(1982\).](#)
- 3 [Braden v. Braden, 575 N.E.2d 293 \(Ind. Ct. App. 1991\).](#)

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. VI A Refs.

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### Counterclaim, Recoupment, and Setoff

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#### VI. Practice and Procedure

##### A. In General






[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Appeal and Error](#)  78(3), 103  
West's Key Number Digest, [Evidence](#)  96(2)  
West's Key Number Digest, [Pleading](#)  138  
West's Key Number Digest, [Set-off and Counterclaim](#)  55, 57, 59  
West's Key Number Digest, [Trial](#)  3(3)

#### A.L.R. Library

A.L.R. Index, Counterclaim, Recoupment, and Setoff  
A.L.R. Index, Pleadings  
West's A.L.R. Digest, [Appeal and Error](#)  78(3), 103  
West's A.L.R. Digest, [Evidence](#)  96(2)  
West's A.L.R. Digest, [Pleading](#)  138  
West's A.L.R. Digest, [Set-off and Counterclaim](#)  55, 57, 59  
West's A.L.R. Digest, [Trial](#)  3(3)

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 90

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure


##### A. In General

## § 90. Standard and burden of proof; evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Evidence](#)  96(2)

West's Key Number Digest, [Pleading](#)  138

No special distinctions apply to the proof of counterclaims, recoupments, or setoffs. The party asserting the existence of a particular state of facts has the burden of proof as to the existence of those facts, regardless of whether the facts establish a setoff,<sup>1</sup> counterclaim,<sup>2</sup> or recoupment.<sup>3</sup>

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#### Footnotes

- 1 [Newbery Corp. v. Fireman's Fund Ins. Co.](#), 95 F.3d 1392 (9th Cir. 1996); [Columbus Green Bldg. Forum v. State](#), 2012-Ohio-4244, 980 N.E.2d 1 (Ohio Ct. App. 10th Dist. Franklin County 2012); [Lone Starr Multi-Theatres, Ltd. v. Max Interests, Ltd.](#), 365 S.W.3d 688 (Tex. App. Houston 1st Dist. 2011).
- 2 [Gager v. Carlson](#), 146 Conn. 288, 150 A.2d 302 (1959); [Aron v. Resz](#), 343 S.W.2d 81 (Mo. Ct. App. 1961); [Zinchuk v. Taddonio](#), 16 Misc. 2d 545, 182 N.Y.S.2d 268 (Mun. Ct. 1958); [Wells v. Clayton](#), 236 N.C. 102, 72 S.E.2d 16 (1952).
- 3 [Jacksonville Paper Co. v. Smith & Winchester Mfg. Co.](#), 147 Fla. 311, 2 So. 2d 890 (1941); [Weeks v. Standish Hardware & Garage Co.](#), 145 Me. 307, 75 A.2d 444 (1950); [Daigle v. Conley](#), 121 Vt. 305, 155 A.2d 744 (1959).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 91

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### Counterclaim, Recoupment, and Setoff

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#### VI. Practice and Procedure

##### A. In General

## § 91. Admissibility of evidence

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  138

Since the same facts may both constitute a defense and be the basis of an independent counterclaim, the fact that a counterclaim is stricken does not prevent the admission of counterclaim evidence that relates to the defense of the main action.<sup>1</sup>

### Reminder:

The federal statute requiring the prior presentation and disallowance of a claim against the federal government is generally thought of as a rule of evidence; it prohibits the introduction of evidence supporting the plaintiff's claim, unless the evidence is preceded by proof of presentation and disallowance. Although a failure to comply with this rule may preclude recovery, compliance need not be pleaded in order to establish jurisdiction.<sup>2</sup>

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### Footnotes

- <sup>1</sup> [Merker v. Lake Region Packing Ass'n](#), 128 Fla. 208, 174 So. 229 (1937).  
As to the nature of a counterclaim, generally, see [§ 1](#).

2

§ 77.

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 92

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

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#### VI. Practice and Procedure

##### A. In General

## § 92. Separate trials of claims or issues

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  138

West's Key Number Digest, [Trial](#)  3(3)

### Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 73 to 78](#) (Motion to try counterclaim in separate trial)

The Federal Rules of Civil Procedure provide that, for convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more counterclaims.<sup>1</sup> The rule empowers the court to sever issues which, if tried with the main issues, would lead to confusion, delay, additional expense, or undue prejudice.<sup>2</sup> Even though a proposed counterclaim arises out of a transaction or occurrence which is the subject of the original action, therefore, the rule gives the court discretion in deciding whether to separate the trials or to allow the counterclaim to be made a part of the original action.<sup>3</sup> A separate trial will not be granted if there is no apparent necessity or adequate reason for one.<sup>4</sup> Furthermore, the court may order a separate trial only if the counterclaim is proper in the first instance of its filing.<sup>5</sup>

### Observation:

In exercising its extensive discretion, the court must balance the adverse factors of confusion, delay, expense, and prejudice against the convenience, economy, and speed of a single trial. This calls for close individual analysis of the factual and legal features of each case and a pragmatic evaluation of the arguments on the issue of severance.<sup>6</sup>

At the state level, a court may grant a separate trial on a counterclaim,<sup>7</sup> in order to avoid prejudice.<sup>8</sup> Whether separate trials of the main action and counterclaim should be granted rests largely in the trial court's discretion,<sup>9</sup> which will not be disturbed on appeal in the absence of a showing of prejudice.<sup>10</sup>

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#### Footnotes

- 1 Fed. R. Civ. P. 42(b).
- 2 Value Line Fund, Inc v. Marcus, 161 F. Supp. 533, 1 Fed. R. Serv. 2d 121 (S.D. N.Y. 1958).
- 3 Insurance Co. of North America v. Morrison, 156 F.R.D. 269 (M.D. Fla. 1994).
- 4 Frostidrink, Inc. v. Supervend Corp., 89 F. Supp. 550 (N.D. Tex. 1950).
- 5 Reynolds Pen Co. v. Marshall Field & Co., 8 F.R.D. 314 (N.D. Ill. 1948).
- 6 Value Line Fund, Inc v. Marcus, 161 F. Supp. 533, 1 Fed. R. Serv. 2d 121 (S.D. N.Y. 1958).
- 7 Domke v. Alyeska Pipeline Service Co., Inc., 137 P.3d 295 (Alaska 2006); Leon v. Noble, 234 S.W.2d 454 (Tex. Civ. App. Eastland 1950).
- 8 Folkner v. Collins, 249 Iowa 1141, 91 N.W.2d 545 (1958); Weir v. Brune, 364 Mo. 415, 262 S.W.2d 597 (1953).
- 9 Nelson v. Inland Motor Freight Co., 60 Idaho 443, 92 P.2d 790 (1939); Ciocca v. Hacker, 4 N.J. Super. 28, 66 A.2d 451 (App. Div. 1949).
- 10 Nelson v. Inland Motor Freight Co., 60 Idaho 443, 92 P.2d 790 (1939).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 93

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### Counterclaim, Recoupment, and Setoff

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#### VI. Practice and Procedure

##### A. In General

## § 93. Judgment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  138

West's Key Number Digest, [Set-off and Counterclaim](#)  55, 57, 59

A setoff or counterclaim becomes a part of a single controversy between the parties, requiring only one verdict and one judgment according to the facts.<sup>1</sup> Thus, the entry of a single judgment in such an action is proper, where the claims relate to the same subject matter.<sup>2</sup>

Generally, if an established setoff or counterclaim is less than the plaintiff's demand, the plaintiff has judgment for the residue only.<sup>3</sup> If the setoff or counterclaim exceeds what the plaintiff claims and establishes, the defendant has judgment for the excess,<sup>4</sup> although there is authority to the contrary.<sup>5</sup>

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#### Footnotes

- 1 [Baldwin v. Baldwin](#), 37 Ohio L. Abs. 400, 47 N.E.2d 792 (Ct. App. 9th Dist. Lorain County 1940); [Keystone Elevator Co., Inc. v. Johnson & Wales University](#), 850 A.2d 912 (R.I. 2004).
- 2 [Bailey-Allen Co., Inc. v. Kurzet](#), 945 P.2d 180 (Utah Ct. App. 1997).
- 3 [Keystone Elevator Co., Inc. v. Johnson & Wales University](#), 850 A.2d 912 (R.I. 2004).  
The setoff amount must be subtracted from the total amount of the larger debt. [American Management, Inc. v. MIF Realty, L.P.](#), 666 N.E.2d 424 (Ind. Ct. App. 1996).
- 4 [Merchants' Heat & Light Co. v. James B. Clow & Sons](#), 204 U.S. 286, 27 S. Ct. 285, 51 L. Ed. 488 (1907); [Unerstall Foundations, Inc. v. Corley](#), 328 S.W.3d 305 (Mo. Ct. App. E.D. 2010); [F.E. Warren Mercantile Co. v. Myers](#), 48 Wyo. 232, 45 P.2d 5 (1935).

As to the tendency of a counterclaim to defeat or diminish the plaintiff's demand, and a counterclaim exceeding the opposing claim, see § 30.

5 [Providence Washington Ins. Co. v. Munoz](#), 85 A.D.3d 1142, 926 N.Y.S.2d 630 (2d Dep't 2011) (finding that a counterclaim cannot affect an affirmative recovery).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 94

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### A. In General

## § 94. Appeal

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Appeal and Error](#)  78(3), 103

West's Key Number Digest, [Pleading](#)  138

### A.L.R. Library

[Appealability of order dismissing counterclaim, 86 A.L.R.3d 944](#)

An order dismissing a counterclaim is not a final order from which an appeal lies, but an appeal from such an order may be taken after a final determination of the action in the trial court.<sup>1</sup> If the dismissal of a defendant's counterclaim is not appealable as a nonfinal order, the defendant cannot initiate a new, separate action to litigate the same issues originally raised in the counterclaim.<sup>2</sup> An order granting leave to file a counterclaim is similarly not appealable, at least until after the conclusion of the action.<sup>3</sup>

An order sustaining certain preliminary objections and dismissing a counterclaim would be an appealable final order if it put the defendant out of court with regard to the counterclaim concerned, even though the plaintiff's claim is still pending.<sup>4</sup> An order dismissing a third-party counterclaim is not an appealable order, however, if the dismissal of the third-party counterclaim does not remove a third-party defendant from the case.<sup>5</sup> In addition, a district court order permitting the replacement of the plaintiffs, without making provision for the defendant's counterclaims to remain pending for independent adjudication, effectively dismisses the defendant's counterclaims against the original plaintiffs and therefore is appealable.<sup>6</sup>

**Observation:**

The remedy for a premature appeal is dismissal without prejudice to any claim the appellant may bring after a final judgment.<sup>7</sup>

If a party seeks interlocutory review of an issue relating to a counterclaim, the trial court must generally certify that there is no just reason for delay.<sup>8</sup> Certification may be excused, however, if all claims have been disposed of and if all issues have been adjudicated.<sup>9</sup>

**CUMULATIVE SUPPLEMENT**

**Cases:**

Trial court's order granting motion to dismiss brother's counterclaims filed by sister, who brought ejectment action against brother and brother's wife for failure to pay rent, and denying brother's oral motion to amend his pleadings, but allowing brother to formally move to amend his pleadings, was not immediately appealable; brother's rights had yet to be fully determined by trial court, action from which appeal came remained to be heard by trial court, and brother had opportunity to appeal order after conclusion of underlying action. *S.C. Code Ann. § 14-3-330. Tillman v. Tillman*, 801 S.E.2d 757 (S.C. Ct. App. 2017).

Oil and gas service company had been deprived of substantial right by dismissal of its counterclaims without prejudice, as required for dismissal to be final appealable order in action brought by lender seeking payment of loans made to finance company's operations in Australia, since dismissal effectively determined action and company had right to have its own claims heard and determined in same proceeding as those of its adversaries. *Wyo. R. App. P. 1.05. Jontra Holdings Pty Ltd v. Gas Sensing Technology Corporation*, 2021 WY 17, 479 P.3d 1222 (Wyo. 2021).

**[END OF SUPPLEMENT]**

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**Footnotes**

- 1 *Chicago Miniature Lamp Works, Inc. v. D'Amico*, 78 Ill. App. 3d 269, 33 Ill. Dec. 805, 397 N.E.2d 138 (1st Dist. 1979); *Breuer v. Flynn*, 64 Md. App. 409, 496 A.2d 695 (1985); *Palisades Collection, LLC v. Watson*, 375 S.W.3d 857 (Mo. Ct. App. W.D. 2012); *Eller v. Eller*, 116 A.D.2d 617, 497 N.Y.S.2d 475 (2d Dep't 1986).
- 2 *City of Parma, Ohio v. Levi*, 536 F.2d 133 (6th Cir. 1976).
- 3 *Haager v. Bullard*, 293 So. 2d 733 (Fla. 2d DCA 1974).
- 4 *Mack Trucks, Inc. v. Performance Associates Corp.*, 381 Pa. Super. 173, 553 A.2d 412 (1989).
- 5 *S. L. T. Warehouse Co. v. Webb*, 304 So. 2d 97 (Fla. 1974).
- 6 *Underwriters at Interest on Cover Note JHB92M10582079 v. Nautronix, Ltd.*, 79 F.3d 480, 34 Fed. R. Serv. 3d 1039 (5th Cir. 1996).
- 7 *Montgomery v. Lambert*, 456 So. 2d 1331 (Fla. 2d DCA 1984).

- 8                    Keith v. Newcourt, Inc., 530 F.2d 826, 21 Fed. R. Serv. 2d 834 (8th Cir. 1976) (construing Fed. R. Civ. P. 54(b)); Corona v. Southern Guaranty Ins. Co., Inc., 294 Ala. 184, 314 So. 2d 61 (1975); B.L. Goldberg & Associates, Inc. v. Uptown, Inc., 1985-NMSC-084, 103 N.M. 277, 705 P.2d 683 (1985); Gauer v. Klemetson, 333 N.W.2d 436 (N.D. 1983).
- 9                    Barker v. Parker, 63 Or. App. 21, 662 P.2d 779 (1983).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. VI B Refs.

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### Counterclaim, Recoupment, and Setoff

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#### VI. Practice and Procedure

##### B. Jurisdiction

[Topic Summary](#) | [Correlation Table](#)

### Research References

#### West's Key Number Digest

West's Key Number Digest, [Pleading](#) 🔑 138

West's Key Number Digest, [Set-off and Counterclaim](#) 🔑 2, 19

#### A.L.R. Library

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A.L.R. Index, Pleadings

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West's A.L.R. Digest, [Set-off and Counterclaim](#) 🔑 2, 19

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 95

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### B. Jurisdiction

## § 95. Compulsory counterclaim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#) 🔑 138

West's Key Number Digest, [Set-off and Counterclaim](#) 🔑 2, 19

Compulsory counterclaims are part and parcel of the underlying case and are adjudicated as part of that case.<sup>1</sup> Arising out of the same transaction or occurrence as the initial claim,<sup>2</sup> a compulsory counterclaim is within the court's jurisdiction for the same reason as is the initial claim.<sup>3</sup>

### Definition:

For a counterclaim to be "compulsory counterclaim," the following criteria must exist: (1) the counterclaim is within the jurisdiction of the court; (2) it is not at the time of filing an answer the subject of a pending action; (3) the claim is mature and owned by the defendant at the time of filing the answer; (4) it arose out of the same transaction or occurrence that is the subject matter of the opposing party's claim; (5) it is against the opposing party in the same capacity; and (6) it does not require the presence of third parties over whom the court cannot acquire jurisdiction.<sup>4</sup>

Compulsory counterclaims in federal courts are ancillary<sup>5</sup> or auxiliary<sup>6</sup> to the main action or claim, and derive their jurisdictional support from the main action or claim.<sup>7</sup> Thus, no independent jurisdictional grounds are required to support a compulsory counterclaim.<sup>8</sup>

**Caution:**

The filing of a compulsory counterclaim does not establish a justiciable controversy if none previously existed.<sup>9</sup>

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**Footnotes**

- 1 PGR Management Co., Inc. v. Credle, 427 Mass. 636, 694 N.E.2d 1273 (1998).
- 2 § 3.
- 3 Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 94 S. Ct. 2504, 41 L. Ed. 2d 243 (1974).
- 4 In re Martin, 358 S.W.3d 767 (Tex. App. Texarkana 2012).
- 5 Inter-State Nat. Bank of Kansas City v. Luther, 221 F.2d 382 (10th Cir. 1955); Williams v. Long, 558 F. Supp. 2d 601 (D. Md. 2008); SiCap Industries, LLC v. Carpenter, 501 F. Supp. 2d 335 (N.D. N.Y. 2007).
- 6 Lenz v. Wagner, 240 F.2d 666 (5th Cir. 1957).
- 7 Fraser v. Astra Steamship Corp., 18 F.R.D. 240 (S.D. N.Y. 1955).
- 8 Cam-Ful Industries, Inc. v. Fidelity and Deposit Co. of Maryland, 922 F.2d 156 (2d Cir. 1991); Shelter Mut. Ins. Co. v. Public Water Supply Dist. No. 7 of Jefferson County, Mo., 747 F.2d 1195, 40 Fed. R. Serv. 2d 526 (8th Cir. 1984); Williams v. Long, 558 F. Supp. 2d 601 (D. Md. 2008); SiCap Industries, LLC v. Carpenter, 501 F. Supp. 2d 335 (N.D. N.Y. 2007).
- 9 International Video Corp. v. Ampex Corp., 484 F.2d 634, 17 Fed. R. Serv. 2d 1240 (9th Cir. 1973).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 96

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### Counterclaim, Recoupment, and Setoff

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#### VI. Practice and Procedure

##### B. Jurisdiction

## § 96. Compulsory counterclaim—Dismissal of original claim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#) 🔑 138

West's Key Number Digest, [Set-off and Counterclaim](#) 🔑 2, 19

Generally, if a complaint is dismissed for lack of federal jurisdiction, a compulsory counterclaim will also be dismissed, because it arises out of the same transaction as the original claim.<sup>1</sup> If an independent jurisdictional basis exists for the counterclaim, however, the court may determine the merits of the counterclaim despite dismissal of the primary claim,<sup>2</sup> regardless of whether the counterclaim is compulsory or permissive. In addition, the trial court may retain jurisdiction over a counterclaim for decision on the merits if the dismissal of the original claim is on other than jurisdictional grounds, even if the counterclaim is before the court only by virtue of ancillary jurisdiction. The preferred practice, however, at least when the proceedings on the counterclaim in federal court have not been extensive, is to dismiss the counterclaim so that the litigation will have to be brought in state court.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> [Scott v. Long Island Sav. Bank, F.S.B.](#), 937 F.2d 738, 19 Fed. R. Serv. 3d 1389 (2d Cir. 1991); [Burns v. Rockwood Distributing Co.](#), 481 F. Supp. 841 (N.D. Ill. 1979).
- <sup>2</sup> [Burns v. Rockwood Distributing Co.](#), 481 F. Supp. 841 (N.D. Ill. 1979); [Byrnes v. Faulkner, Dawkins & Sullivan](#), 362 F. Supp. 864, 17 Fed. R. Serv. 2d 808 (S.D. N.Y. 1973), *aff'd*, 550 F.2d 1303 (2d Cir. 1977).
- <sup>3</sup> [National Research Bureau, Inc. v. Bartholomew](#), 482 F.2d 386, 17 Fed. R. Serv. 2d 812 (3d Cir. 1973) (noting that this practice relieves the federal courts of deciding what have become routine, nondiversity state claims).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 97

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### Counterclaim, Recoupment, and Setoff

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#### VI. Practice and Procedure

##### B. Jurisdiction

## § 97. Permissive counterclaim

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### West's Key Number Digest

West's Key Number Digest, [Pleading](#) 🔑 138

West's Key Number Digest, [Set-off and Counterclaim](#) 🔑 2, 19

In order to be litigated, a permissive counterclaim must allege or be based on an independent source of jurisdiction,<sup>1</sup> unless the permissive counterclaim is in the nature of a setoff and is used defensively rather than affirmatively.<sup>2</sup>

In state practice, questions of practice and procedure with respect to setoffs, counterclaims, or recoupment are frequently governed by statute.<sup>3</sup> Under the rule allowing a party to file a permissive counterclaim against any opposing party, even when the subject matter is clearly one within the jurisdiction of the court, the court must nonetheless have personal jurisdiction over the plaintiff/counterdefendant in regard to the counterclaim.<sup>4</sup>

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#### Footnotes

- <sup>1</sup> [Hartford Acc. and Indem. Co. v. Sullivan](#), 846 F.2d 377, 10 Fed. R. Serv. 3d 1331 (7th Cir. 1988); [SiCap Industries, LLC v. Carpenter](#), 501 F. Supp. 2d 335 (N.D. N.Y. 2007); [Kellogg USA, Inc. v. B. Fernandez Hermanos, Inc.](#), 553 F. Supp. 2d 51 (D.P.R. 2007).

As to permissive counterclaims, generally, see § 4.
- <sup>2</sup> [Fraser v. Astra Steamship Corp.](#), 18 F.R.D. 240 (S.D. N.Y. 1955).

As to setoffs, generally, see §§ 6, 7.
- <sup>3</sup> [Linscott v. Linscott](#), 243 Iowa 335, 51 N.W.2d 428, 30 A.L.R.2d 789 (1952).
- <sup>4</sup> [Beach Park Development Corp. v. Remhof](#), 673 So. 2d 912 (Fla. 2d DCA 1996).

A federal court lacks subject matter jurisdiction to entertain permissive counterclaims where the counterclaims arise under state law and there is not the requisite complete diversity of citizenship between



the parties. [Chemtech Industries, Inc. v. Goldman Financial Group, Inc.](#), 156 F.R.D. 181, 30 Fed. R. Serv. 3d 634 (E.D. Mo. 1994).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 98

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### B. Jurisdiction

### § 98. Permissive counterclaim—Permissive counterclaim as waiver of personal jurisdiction or venue defense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  138

West's Key Number Digest, [Set-off and Counterclaim](#)  2, 19

#### A.L.R. Library

[Joinder of counterclaim under Rule 13\(a\) or 13\(b\) of Federal Rules of Civil Procedure with jurisdictional defense under Rule 12\(b\), as waiver of such defense, 17 A.L.R. Fed. 388](#)

In the federal courts, there is uncertainty as to whether the filing of a permissive counterclaim constitutes a waiver of a defense of lack of personal jurisdiction that is asserted in the same pleading. While the procedural rules implicitly authorize a defendant to join a jurisdictional defense with a counterclaim without waiving the defense,<sup>1</sup> a defendant is not specifically authorized to couple a counterclaim with a personal jurisdiction or venue defense to the original claim without waiving the defense.<sup>2</sup> The rules provide no specific guidance as to how to present a counterclaim with defenses to the original claim or as to the counterclaim's effect on asserted defenses. Some courts, which generally do not discuss the significance of whether a counterclaim is compulsory or permissive, have held or recognized that a defendant who joins a counterclaim with a personal jurisdiction or venue defense thereby waives the defense.<sup>3</sup> In considering the effect of counterclaims in this regard, however, some courts have taken the contrary view by holding or recognizing that a defendant's assertion of a counterclaim does not waive personal jurisdiction and venue defenses to the original claim.<sup>4</sup>

Footnotes

- 1 Gates Learjet Corp. v. Jensen, 743 F.2d 1325 (9th Cir. 1984) (construing Fed. R. Civ. P. 12(b)).
- 2 Neifeld v. Steinberg, 438 F.2d 423, 8 U.C.C. Rep. Serv. 897, 17 A.L.R. Fed. 374 (3d Cir. 1971) (construing Fed. R. Civ. P. 12(b)).
- 3 Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 11 Fed. R. Serv. 2d 71 (9th Cir. 1967); Thompson v. U.S., 312 F.2d 516 (10th Cir. 1962); Textron, Inc. v. Maloney-Crawford Tank & Mfg. Co., 252 F. Supp. 362, 10 Fed. R. Serv. 2d 148 (S.D. Tex. 1966); Medicenters of America, Inc. v. T & V Realty & Equipment Corp., 371 F. Supp. 1180, 18 Fed. R. Serv. 2d 688 (E.D. Va. 1974).
- 4 Knapp-Monarch Co. v. Dominion Elec. Corp., 365 F.2d 175, 10 Fed. R. Serv. 2d 104 (7th Cir. 1966); Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 11 Fed. R. Serv. 2d 71 (9th Cir. 1967); Hasse v. American Photograph Corp., 299 F.2d 666, 5 Fed. R. Serv. 2d 58 (10th Cir. 1962); Medicenters of America, Inc. v. T & V Realty & Equipment Corp., 371 F. Supp. 1180, 18 Fed. R. Serv. 2d 688 (E.D. Va. 1974).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 99

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### B. Jurisdiction

## § 99. Counterclaim maturing or acquired after pleading

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  138

West's Key Number Digest, [Set-off and Counterclaim](#)  2, 19

There is divided authority as to whether a counterclaim maturing or acquired after the action is brought may be entertained under ancillary jurisdiction in the absence of any other jurisdictional basis. Some courts claim jurisdiction when such a counterclaim would be cognizable as a compulsory counterclaim had it existed when the main action was filed.<sup>1</sup> Other courts, however, have held to the contrary.<sup>2</sup>

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#### Footnotes

<sup>1</sup> [Harbor Ins. Co. v. Continental Bank Corp.](#), 922 F.2d 357, 20 Fed. R. Serv. 3d 526 (7th Cir. 1990) (construing Fed. R. Civ. P. 13(a), 13(e)).

<sup>2</sup> [Young v. City of New Orleans](#), 751 F.2d 794, 40 Fed. R. Serv. 2d 1437 (5th Cir. 1985).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 100

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### B. Jurisdiction

### § 100. Effect of statute of limitations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Pleading](#) 🔑 138

West's Key Number Digest, [Set-off and Counterclaim](#) 🔑 2, 19

In the absence of a statute to the contrary, a demand pleaded by way of a setoff, counterclaim, or cross-claim is regarded as an affirmative action in most jurisdictions, and therefore, unlike a matter of pure defense, is subject to the operation of the statute of limitations.<sup>1</sup> While under some authority both permissive and compulsory counterclaims seeking affirmative relief are actions subject to statutes of limitation,<sup>2</sup> under other authority, counterclaims that arise out of the same transaction as a claim asserted in the complaint are not barred by the statute of limitations, even though an independent action by the defendant might have been time-barred at the time the action was commenced.<sup>3</sup>

#### Observation:

Generally, recoupment may be asserted as long as the plaintiff's claim can be asserted.<sup>4</sup> As a purely defensive procedure, therefore, recoupment is available to the defendant so long as the plaintiff's claim survives, even though affirmative action by a defendant is barred by limitations.<sup>5</sup>

Footnotes

- 1 [Mynatt v. Collis](#), 274 Kan. 850, 57 P.3d 513 (2002).  
A cross-claim seeking affirmative, independent relief does not relate back to the filing of the original claim. [Kansa Reinsurance Co., Ltd. v. Congressional Mortg. Corp. of Texas](#), 20 F.3d 1362, 29 Fed. R. Serv. 3d 272 (5th Cir. 1994).
- 2 [Murray v. Mansheim](#), 2010 SD 18, 779 N.W.2d 379 (S.D. 2010).
- 3 [U.S. Fidelity and Guar. Co. v. Delmar Development Partners, LLC](#), 22 A.D.3d 1017, 803 N.Y.S.2d 254 (3d Dep't 2005).
- 4 [Biddle v. Biddle](#), 163 N.J. Super. 455, 395 A.2d 218 (Law Div. 1978); [Minex Resources, Inc. v. Morland](#), 467 N.W.2d 691 (N.D. 1991).  
The equitable plea of statutory recoupment is not subject to a statute of limitations defense. [Cummings v. Fulghum](#), 261 Va. 73, 540 S.E.2d 494 (2001).  
As to the nature of recoupment, generally, see § 5.
- 5 [Rolls-Royce Corp. v. Heros, Inc.](#), 576 F. Supp. 2d 765 (N.D. Tex. 2008).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. VI C Refs.

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### C. Pleading

[Topic Summary](#) | [Correlation Table](#)

## Research References

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  138 to 146, 167, 169, 262

West's Key Number Digest, [Set-off and Counterclaim](#)  44(1), 56, 60

### A.L.R. Library

A.L.R. Index, Counterclaim, Recoupment, and Setoff

A.L.R. Index, Pleadings

West's A.L.R. Digest, [Pleading](#)  138 to 146, 167, 169, 262

West's A.L.R. Digest, [Set-off and Counterclaim](#)  44(1), 56, 60

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 101

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure


##### C. Pleading

##### 1. In General

## § 101. Designation as counterclaim, setoff, or recoupment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  138 to 146

### Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 3 to 20](#) (Counterclaim; recoupment; setoff)

[Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure §§ 117 to 131](#) (Counterclaims and cross-claims)

Some jurisdictions have dissolved the distinction between setoff, recoupment, and counterclaim for pleading purposes.<sup>1</sup> Whether a pleading sets out a defensive recoupment or an affirmative counterclaim is determined by the pleader's intent.<sup>2</sup> A counterclaim has been treated as an answer alleging affirmative defenses;<sup>3</sup> conversely, an affirmative defense may be treated as a counterclaim although not so denominated.<sup>4</sup>

### Practice Tip:

In the interest of clarity, an asserted counterclaim should be designated and pleaded as such,<sup>5</sup> although the court will hear and determine a matter recognizable as a counterclaim from the allegations in the answer and the proof offered in its support.<sup>6</sup>



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Footnotes

- 1 [Mark VII Financial Consultants Corp. v. Smedley](#), 792 P.2d 130 (Utah Ct. App. 1990); [True v. Hi-Plains Elevator Machinery, Inc.](#), 577 P.2d 991 (Wyo. 1978).  
There is no distinction in modern pleading between recoupment and setoff; both are treated as any other defensive matter. [Dudek, Inc. v. Shred Pax Corp.](#), 254 Ill. App. 3d 862, 193 Ill. Dec. 653, 626 N.E.2d 1204 (1st Dist. 1993).
- 2 [Staab v. Thoreson](#), 579 S.W.2d 414 (Mo. Ct. App. S.D. 1979).
- 3 [Quirico v. Lopez](#), 1987-NMSC-070, 106 N.M. 169, 740 P.2d 1153 (1987).
- 4 [Torre v. Giorgio](#), 51 A.D.3d 1010, 858 N.Y.S.2d 765 (2d Dep't 2008).
- 5 [Shelter Mut. Ins. Co. v. Public Water Supply Dist. No. 7 of Jefferson County, Mo.](#), 747 F.2d 1195, 40 Fed. R. Serv. 2d 526 (8th Cir. 1984).
- 6 [Commonwealth Oil Co. v. Wiley](#), 35 Ohio App. 152, 171 N.E. 865 (8th Dist. Cuyahoga County 1930).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 102

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### C. Pleading

##### 1. In General

## § 102. Admission of plaintiff's cause of action; inconsistent claims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  56

### A.L.R. Library

[Estoppel of defendant to deny plaintiff's corporate existence by filing counterclaim or cross action against it, 51 A.L.R.2d 1449](#)

Generally, one who claims setoff or compensation necessarily admits the debt sued upon.<sup>1</sup> While a bare plea of setoff or compensation, as opposed to a claim of indebtedness, has the effect of admitting the indebtedness, a plea of setoff or compensation can be combined with a denial of an asserted indebtedness so that the latter plea does not have the effect of admitting the indebtedness.<sup>2</sup> In some jurisdictions, the common-law rule that a plea of setoff admits the validity of the contract on which the plaintiff sues has been changed by a statute or rule.<sup>3</sup> Under some statutes, pleading a counterclaim on the same contract as that on which the action is brought is not an admission of the plaintiff's cause of action, and the defendant's admission of the facts alleged in the plaintiff's petition is not a condition for maintaining a counterclaim.<sup>4</sup>

### Observation:

A counterclaim asserted under a theory inconsistent with other theories of defense is not premature and need not be stayed.<sup>5</sup> While inconsistent pleadings are generally allowed, multiple and inconsistent theories of recovery should not lead to more than one satisfaction of a resulting judgment.<sup>6</sup>

In jurisdictions in which a plea of recoupment is an admission of the plaintiff's cause of action, the defendant cannot deny the plaintiff's cause of action and simultaneously claim a recoupment arising out of the transaction that is the basis of the plaintiff's suit.<sup>7</sup> If a plea of recoupment does not confess the action sued on by the plaintiff and if the plaintiff has no demand or right to recover the amount claimed, the defendant may have judgment on such a plea, even though the plaintiff fails entirely as to his or her claim.<sup>8</sup>

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#### Footnotes

- 1 [Hill Wholesale Distributing Co., Inc. v. Louis W. Howat & Son](#), 666 So. 2d 1252 (La. Ct. App. 2d Cir. 1996).
- 2 [Wadlington v. Barron](#), 91 So. 2d 448 (La. Ct. App. 2d Cir. 1956).
- 3 [Davis v. Evans](#), 261 Ala. 548, 74 So. 2d 705, 48 A.L.R.2d 740 (1954); [Cardona v. Lynstar Corp.](#), 955 So. 2d 25 (Fla. 3d DCA 2007).
- 4 [Shade v. Brinkopf](#), 119 S.W.2d 444 (Mo. Ct. App. 1938).
- 5 [International Tel. & Tel. Corp. v. American Tel. & Tel. Co.](#), 444 F. Supp. 1148 (S.D. N.Y. 1978).  
As to unmatured or contingent claims, see §§ 23 to 25.
- 6 [UIV Corp. v. Oswald](#), 139 Ga. App. 697, 229 S.E.2d 512, 20 U.C.C. Rep. Serv. 816 (1976).
- 7 [Meyers v. Jay-Bee Realty Corp.](#), 300 Mich. 522, 2 N.W.2d 488 (1942).
- 8 [Davis v. Evans](#), 261 Ala. 548, 74 So. 2d 705, 48 A.L.R.2d 740 (1954) (holding that a plea of recoupment becomes a cross action attendant with the same rights and subject to the same defenses as the original complaint).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 103

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure


##### C. Pleading

##### 1. In General

## § 103. Degree of specificity required; notice to opponent

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  141, 142

### Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 3 to 20](#) (Counterclaim; recoupment; setoff)

[Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure §§ 117 to 131](#) (Counterclaims and cross-claims)

As a demand for affirmative relief, a counterclaim must allege the basis for a demand and not merely a defensive matter.<sup>1</sup> The assertion of a counterclaim is normally held to the same standard of specificity applicable to a complaint.<sup>2</sup>

A pleading which sets forth a claim for relief, such as a counterclaim, must contain a short and plain statement of the claim and a demand for judgment for the relief sought.<sup>3</sup> A counterclaim must assert more than bare legal conclusions, and an unspecific counterclaim cannot be the basis for a judgment on the pleadings, even if there has been a failure to reply.<sup>4</sup> A counterclaim must be at least as specific as a complaint in order to provide an adversary with notice of the counterclaimant's demand.<sup>5</sup> If a pleading is not sufficiently specific and fails to place the opponent on notice, the counterclaim may not relate back to the date of the original answer and may therefore be barred by the statute of limitations.<sup>6</sup>

Footnotes

- 1 Cox v. Doctor's Associates, Inc., 245 Ill. App. 3d 186, 184 Ill. Dec. 714, 613 N.E.2d 1306 (5th Dist. 1993); Mad River Boat Trips, Inc. v. Jackson Hole Whitewater, Inc., 818 P.2d 1137 (Wyo. 1991).
- 2 98 Lords Highway, LLC v. One Hundred Lords Highway, LLC, 138 Conn. App. 776, 54 A.3d 232 (2012); Brewer v. Hatcher, 52 N.C. App. 601, 279 S.E.2d 69 (1981).  
The allegations of a counterclaim need only assert an injury resulting from another's conduct. *Applied Ecological Systems, Inc. v. Weskem, Inc.*, 212 Ga. App. 65, 441 S.E.2d 279 (1994).
- 3 Fan v. Qualitest Pharmaceuticals, 120 So. 3d 1076 (Ala. Civ. App. 2013); Jim & Tracy's Alignment, Inc. v. Smith, 1998 MT 203, 290 Mont. 368, 966 P.2d 731 (1998).
- 4 City of Gainesville v. Florida Power & Light Co., 488 F. Supp. 1258 (S.D. Fla. 1980); Charter Bank v. Eckert, 223 Ill. App. 3d 918, 166 Ill. Dec. 282, 585 N.E.2d 1304 (5th Dist. 1992).
- 5 Elmwood Federal Sav. Bank v. Forest Manor Estates, Inc., 621 A.2d 354 (Del. Super. Ct. 1992); Nuccio v. Chicago Commodities, Inc., 257 Ill. App. 3d 437, 195 Ill. Dec. 670, 628 N.E.2d 1134 (1st Dist. 1993).
- 6 New York Tel. Co. v. County Asphalt, Inc., 86 Misc. 2d 958, 382 N.Y.S.2d 211 (Sup 1976).  
As to statutes of limitations with regard to counterclaims, see § 100.

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 104

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure


##### C. Pleading

##### 1. In General

## § 104. Objections and motions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  [138](#), [142](#)

### Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 52, 53](#) (Motion or demurrer for more definite pleading)

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 56 to 70](#) (Motion to strike or dismiss counterclaim)

The rules relating to motions to make pleadings more definite and certain generally apply to setoffs and counterclaims. Therefore, if a counterclaim fails to allege the elements of an affirmative claim, the counterclaim's defects should be challenged by a motion to strike or to make more definite and certain.<sup>1</sup>

A motion to strike or expunge a counterclaim may be invoked in a proper case.<sup>2</sup> While such a motion has been used to determine the propriety of the counterclaim,<sup>3</sup> it has been found that such motion cannot be used to determine the sufficiency in substance of the counterclaim, and may not substitute for a jurisdiction's provisions for summary judgment or judgment on the pleadings.<sup>4</sup> Note, when a party is ordered by the court to strike a counterclaim and the party files a subsequent pleading omitting that counterclaim, the mere fact of omission does not mean that the counterclaim has been waived or relinquished.<sup>5</sup>

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Footnotes

- 1 [Werner-Continental, Inc. v. Farkas](#), 478 F. Supp. 815 (S.D. Ohio 1979), [aff'd](#), 661 F.2d 935 (6th Cir. 1981).
- 2 [Springfield-De Witt Gardens, Inc. v. Wood](#), 143 Conn. 708, 125 A.2d 488 (1956); [Sams v. Kern](#), 121 Ind. App. 370, 98 N.E.2d 920 (1951); [Superior Tool & Die Co. v. Bailey](#), 17 Misc. 2d 614, 187 N.Y.S.2d 587 (Sup 1959).
- 3 [Sams v. Kern](#), 121 Ind. App. 370, 98 N.E.2d 920 (1951).
- 4 [National Cash Register Co. v. Ansell](#), 125 Pa. Super. 309, 189 A. 738 (1937).  
A counterclaim is subject to a motion for judgment on the pleadings on the grounds that it fails to state a claim upon which relief can be granted. [Fed. R. Civ. P. 12\(b\)\(6\)](#).
- 5 [Propp v. Long](#), 313 Or. 218, 831 P.2d 685 (1992).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 105

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### C. Pleading

##### 1. In General

## § 105. Amendments

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  262

### Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 38 to 49](#) (Motion for leave to amend. Pleading to allow counterclaim)

Pleas of setoff, counterclaim, or recoupment may be amended in accordance with the usual rules.<sup>1</sup> A court has the same discretion to permit amendment as it has to permit the filing of a counterclaim in the first instance.<sup>2</sup>

An amendment should be timely, since dilatory amendments are disfavored.<sup>3</sup> It is not an abuse of discretion to dismiss an untimely counterclaim,<sup>4</sup> and dismissal is the appropriate remedy where the opponent will be prejudiced by the amendment.<sup>5</sup> A court may, however, permit a dilatory amendment<sup>6</sup> when doing so does not prejudice the opponent,<sup>7</sup> or when justice so requires.<sup>8</sup>

### Caution:

If a default has been entered, the pleading may not be amended to assert a counterclaim until the default is set aside.<sup>9</sup>



## CUMULATIVE SUPPLEMENT

### Cases:

Even if makers of note consolidated from two prior notes and those two prior notes had not expressly waived any counterclaims that could be asserted as offsets to their indebtedness, proposed amendment to their answer in action by payees of consolidated note to recover amount due to add counterclaim based on allegations that payee of original notes, who had also sold makers the land now subject to mortgage, violated environmental laws before sale, was patently devoid of merit, and thus makers were not entitled to leave to amend; makers could not assert counterclaim against payees in their individual capacities to recover damages based on third party's alleged violations of environmental statutes. [Rugg v. O'Donnell](#), 159 A.D.3d 1606, 73 N.Y.S.3d 853 (4th Dep't 2018).

Development company and its principal failed to provide some evidence of merit to support their proposed counterclaims in architectural and interior design firm's suit for account stated and to recover monies owed on invoices for work on two projects, and thus leave to serve amended answer containing those counterclaims was correctly denied. [Chianis & Anderson Architects, PLLC v. Courterback Development Co., LLC](#), 140 A.D.3d 1286, 34 N.Y.S.3d 648 (3d Dep't 2016).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Scherer v. Scherer](#), 150 So. 2d 496, 98 A.L.R.2d 1260 (Fla. 3d DCA 1963); [Unique Watch Crystal Co. v. Kotler](#), 344 Ill. App. 54, 99 N.E.2d 728 (1st Dist. 1951).  
The purpose of the rule that permits a party to set up a counterclaim by amendment when justice so requires is to prevent the fragmentation of litigation, multiplicity of actions, and to conserve judicial resources. [Sorsby v. Turner](#), 201 W. Va. 571, 499 S.E.2d 300 (1997).
- 2 [Kirkendoll v. Hogan](#), 267 Ark. 1083, 593 S.W.2d 498 (Ct. App. 1980).  
It is within the trial court's discretion whether to allow an omitted counterclaim under the rule of civil procedure governing amendment of pleadings. [Eason v. Bynon](#), 845 So. 2d 817 (Ala. Civ. App. 2002).
- 3 [Nameloc, Inc. v. Jack, Lyon & Jones, P.A.](#), 362 Ark. 175, 208 S.W.3d 129 (2005); [First Robinson Sav. & Loan v. Ledo Const. Co., Inc.](#), 210 Ill. App. 3d 889, 155 Ill. Dec. 304, 569 N.E.2d 304 (5th Dist. 1991); [Connecticut Valley Homes of East Lyme, Inc. v. Bardsley](#), 867 A.2d 788 (R.I. 2005).  
A property owner's motion to amend his counterclaim against an environmental cleanup consultant to include a claim for deceptive practices in commerce was properly denied on the basis that it came late in the case. [Delta Environmental Consultants of North Carolina, Inc. v. Wysong & Miles Co.](#), 132 N.C. App. 160, 510 S.E.2d 690 (1999).
- 4 [Mahurin v. St. Luke's Hosp. of Kansas City](#), 809 S.W.2d 418 (Mo. Ct. App. W.D. 1991); [Edgewater Townhouse Homeowner's Ass'n v. Holtman](#), 256 Mont. 182, 845 P.2d 1224 (1993).
- 5 [Faerber v. Cavanagh](#), 568 A.2d 326 (R.I. 1990).  
As to counterclaims maturing or acquired after pleading, see §§ 24, 25.
- 6 [Shaw v. Ruiz](#), 207 Ga. App. 299, 428 S.E.2d 98 (1993); [Fajen v. Powlus](#), 98 Idaho 246, 561 P.2d 388 (1977); [Faulkner v. Town of Chestertown](#), 290 Md. 214, 428 A.2d 879 (1981).

- 7                    Fuente v. Southern Ocean Transport, Inc., 933 So. 2d 651 (Fla. 3d DCA 2006); Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014); Harlem Real Estate LLC v. New York City Economic Development Corp., 111 A.D.3d 549, 976 N.Y.S.2d 33 (1st Dep't 2013).
- 8                    Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).
- 9                    Ragan v. Smith, 188 Ga. App. 770, 374 S.E.2d 559 (1988).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 106

American Jurisprudence, Second Edition | May 2021 Update

### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure


##### C. Pleading

##### 1. In General

## § 106. Joinder of causes of action and of counterclaims

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  138, 142

West's Key Number Digest, [Set-off and Counterclaim](#)  44(1)

Pursuant to the Federal Rules of Civil Procedure, a party asserting a counterclaim may join, as independent or alternate claims, as many claims as the party has against an opposing party.<sup>1</sup> In state courts as well, a defendant may generally set forth by answer as many counterclaims as he or she has.<sup>2</sup> The counterclaims must be separately stated,<sup>3</sup> refer to the relevant causes of action in a manner that allows them to be intelligently distinguished,<sup>4</sup> and be consistent with each other.<sup>5</sup>

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### Footnotes

- <sup>1</sup> Fed. R. Civ. P. 18(a).
- <sup>2</sup> Vaughn v. Conran, 20 S.W.2d 968 (Mo. Ct. App. 1929); Krausse v. Greenfield, 61 Or. 502, 123 P. 392 (1912).
- <sup>3</sup> Vaughn v. Conran, 20 S.W.2d 968 (Mo. Ct. App. 1929); Raymond Bros. v. Greene & Co., 12 Neb. 215, 10 N.W. 709 (1881).
- <sup>4</sup> Raymond Bros. v. Greene & Co., 12 Neb. 215, 10 N.W. 709 (1881); Krausse v. Greenfield, 61 Or. 502, 123 P. 392 (1912).
- <sup>5</sup> Vaughn v. Conran, 20 S.W.2d 968 (Mo. Ct. App. 1929); J.J. Little & Ives Co. v. Madison Paper Stock Co., 169 N.Y.S. 104 (App. Term 1918).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 107

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### C. Pleading

##### 2. Failure to Plead Claim

### § 107. Failure to plead compulsory counterclaim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  60

#### A.L.R. Library

[Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes, 22 A.L.R.2d 621](#)

[Effect of filing as separate federal action claim that would be compulsory counterclaim in pending federal action, 81 A.L.R. Fed. 240](#)

A compulsory counterclaim that is not stated prior to the conclusion of the action by judgment is generally barred<sup>1</sup> in a subsequent or independent action.<sup>2</sup> The failure to file the counterclaim is res judicata of the relief that might have been obtained by the counterclaim.<sup>3</sup>

On the other hand, the failure to plead a compulsory counterclaim does not preclude the assertion of a permissive counterclaim of the original action or the institution of a separate proceeding on a permissive counterclaim.<sup>4</sup> In addition, a plaintiff's action for damages may not be barred by the failure to file a counterclaim in a prior action against the plaintiff involving the incident, if the plaintiff's failure to do so resulted from the plaintiff's confinement in a hospital at the time that the prior action was settled without his or her knowledge.<sup>5</sup> Although a compulsory counterclaim not raised in the first action is barred in subsequent litigation, the claim is not necessarily also barred from consideration in subsequent arbitration proceedings.<sup>6</sup> It has also been

found that the rule governing compulsory counterclaims does not prohibit the filing in a separate lawsuit of what would be a compulsory counterclaim if that party is willing to run the risk that it may well lose the right to pursue its claim in the separate lawsuit if the initial suit results in a final judgment first.<sup>7</sup>

**Practice Tip:**

In jurisdictions lacking compulsory counterclaims, the fact that an action might have been a compulsory counterclaim in a federal suit does not preclude it from subsequently being brought in a state court.<sup>8</sup>

## CUMULATIVE SUPPLEMENT

### Cases:

Lessors' claim for over a year's worth of unpaid rent owed by lessee, who continued to occupy airport hangar space after lease was terminated, was not a compulsory counterclaim that should have been raised in lessee's previous lawsuit initiated shortly after notice of lease termination, which alleged claims including breach of lease; no claim for rent arrearages existed at the time the lawsuit was initiated since rent was not owed yet, it was unclear how long lessee would remain on premises or if he would continue to pay rent, and lessee informed lessor that it could charge his credit card for future rent. [Ohio Civ. R. 12\(A\)\(1\) and \(B\). Ashtabula County Airport Authority v. Rich, 2017-Ohio-9263, 103 N.E.3d 51](#) (Ohio Ct. App. 11th Dist. Ashtabula County 2017), appeal not allowed, [152 Ohio St. 3d 1491, 2018-Ohio-2155, 99 N.E.3d 426](#) (2018).

Failure to plead a compulsory counterclaim will result in the claim being barred in future proceedings. [Wyo. R. Civ. P. 13\(a\). Gas Sensing Technology Corporation v. New Horizon Ventures Pty Ltd as Trustee of Linklater Family Trust, 2020 WY 114, 471 P.3d 294](#) (Wyo. 2020).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 [Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 94 S. Ct. 2504, 41 L. Ed. 2d 243](#) (1974); [Dickerson v. Goodman, 161 P.3d 1205](#) (Alaska 2007); [Mirchandani v. BMO Harris Bank, N.A., 235 Ariz. 68, 326 P.3d 335](#) (Ct. App. Div. 1 2014); [Wilmington Trust Co. v. Sullivan-Thorne, 2013 ME 94, 81 A.3d 371](#) (Me. 2013); [Commint Technical Services, Inc. v. Quickel, 314 S.W.3d 646](#) (Tex. App. Houston 14th Dist. 2010).  
The plaintiffs' claims were compulsory counterclaims that had to be raised in the defendants' prior action, and thus dismissal of the plaintiffs' claims was warranted, where the actions arose out of the same contract, and the current action was a mirror reflection of the plaintiff's answer and counterclaims against the defendants in the prior action. [Bonadio v. East Park Research, Inc., 220 F.R.D. 187](#) (N.D. N.Y. 2003).  
As to compulsory counterclaims, generally, see § 3.
- 2 [Align Technology, Inc. v. Bao Tran, 179 Cal. App. 4th 949, 102 Cal. Rptr. 3d 343](#) (6th Dist. 2009); [Smith v. Tronitec, Inc., 277 Ga. 210, 586 S.E.2d 661](#) (2003); [Keystone Freight Corp. v. Bartlett Consol., Inc., 77](#)

Mass. App. Ct. 304, 930 N.E.2d 744 (2010); *Wickenhauser v. Lehtinen*, 2007 WI 82, 302 Wis. 2d 41, 734 N.W.2d 855 (2007).

3        *Oshana v. FCL Builders, Inc.*, 2013 IL App (1st) 120851, 373 Ill. Dec. 592, 994 N.E.2d 77 (App. Ct. 1st Dist. 2013); *Shinn v. Bank of Crocker*, 803 S.W.2d 621 (Mo. Ct. App. S.D. 1990); *Quintus v. McClure*, 41 Ohio App. 3d 402, 536 N.E.2d 22 (9th Dist. Medina County 1987).

The common-law compulsory counterclaim rule operates to preserve the integrity and finality of judgments and the litigant's reliance on them, by precluding a collateral attack upon a judgment in a subsequent proceeding. *Wickenhauser v. Lehtinen*, 2007 WI 82, 302 Wis. 2d 41, 734 N.W.2d 855 (2007).

4        *State ex rel. Rosenfeld v. Boyer*, 145 So. 2d 547 (Fla. 1st DCA 1962).

5        *LaFollette v. Herron*, 211 F. Supp. 919 (E.D. Tenn. 1962) (involving an automobile accident).

As to other exceptions to the compulsory counterclaim rule, see §§ 15 to 18.

6        *Bristol Farmers Market and Auction Co. v. Arlen Realty & Development Corp.*, 589 F.2d 1214, 26 Fed. R. Serv. 2d 472 (3d Cir. 1978).

7        *Crain v. CRST Van Expedited, Inc.*, 360 S.W.3d 374 (Tenn. Ct. App. 2011).

8        *Nippert v. Baton Rouge Railcar Services, Inc.*, 526 So. 2d 824 (La. Ct. App. 1st Cir. 1988), writ denied, 530 So. 2d 84 (La. 1988) and writ denied, 530 So. 2d 87 (La. 1988) and writ denied, 530 So. 2d 91 (La. 1988).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 108

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### C. Pleading

##### 2. Failure to Plead Claim

## § 108. Failure to plead permissive counterclaim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  60

### A.L.R. Library

[Failure to assert matter as counterclaim as precluding assertion thereof in subsequent action, under federal rules or similar state rules or statutes, 22 A.L.R.2d 621](#)

In contrast to a compulsory counterclaim, a permissive counterclaim may, but need not, be stated.<sup>1</sup> The claimant has the option of whether or not to plead a permissive counterclaim, and the failure to do so does not render the judgment in the case res judicata,<sup>2</sup> or preclude asserting the permissive counterclaim in a subsequent action.<sup>3</sup>

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#### Footnotes

- <sup>1</sup> [Switzer Bros. v. Locklin, 207 F.2d 483 \(7th Cir. 1953\); Bichler v. DEI Systems, Inc., 2009 UT 63, 220 P.3d 1203 \(Utah 2009\).](#)
- As to permissive counterclaims, generally, see § 4.
- <sup>2</sup> [Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 64 S. Ct. 268, 88 L. Ed. 376 \(1944\); Switzer Bros. v. Locklin, 207 F.2d 483 \(7th Cir. 1953\); Gerald v. Foster, 251 Miss. 63, 168 So. 2d 518 \(1964\).](#)

3                      [Mercoird Corp. v. Mid-Continent Inv. Co.](#), 320 U.S. 661, 64 S. Ct. 268, 88 L. Ed. 376 (1944); [Switzer Bros. v. Locklin](#), 207 F.2d 483 (7th Cir. 1953).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 109

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### C. Pleading

##### 2. Failure to Plead Claim

### § 109. Failure to plead setoff or recoupment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Set-off and Counterclaim](#)  60

A setoff does not occur automatically but must be exercised affirmatively.<sup>1</sup> The failure to allege a setoff as an affirmative defense can bar the setoff in the same manner as any other waiver of an affirmative defense by the failure to plead it.<sup>2</sup>

The failure to plead recoupment affirmatively can also waive the right to assert it.<sup>3</sup> Note, recoupment is adequately pled by notice of the asserted defense, regardless of the words used.<sup>4</sup>

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#### Footnotes

<sup>1</sup> [OCI Mortg. Corp. v. Marchese](#), 255 Conn. 448, 774 A.2d 940 (2001); [Clark County School Dist. v. Richardson Const., Inc.](#), 123 Nev. 382, 168 P.3d 87, 224 Ed. Law Rep. 455 (2007).

A setoff between parties to a lawsuit is not automatic but must be preceded by motion. [Pinkerton & Laws, Inc. v. Macro Const., Inc.](#), 226 Ga. App. 169, 485 S.E.2d 797 (1997).

<sup>2</sup> [Southern Management and Development, L.P. v. Gardner](#), 992 So. 2d 919 (Fla. 4th DCA 2008); [Pinkerton & Laws, Inc. v. Macro Const., Inc.](#), 226 Ga. App. 169, 485 S.E.2d 797 (1997); [Latter & Blum v. Grand Properties, Ltd.](#), 617 So. 2d 80 (La. Ct. App. 4th Cir. 1993), writ denied, 619 So. 2d 578 (La. 1993); [Mad River Boat Trips, Inc. v. Jackson Hole Whitewater, Inc.](#), 818 P.2d 1137 (Wyo. 1991).

If statutory law requires that any setoff be asserted in an answer, a failure to plead in accordance with the statute bars the setoff. [Farm Bureau Mut. Ins. Co. of Arkansas, Inc. v. Robinson](#), 262 Ark. 850, 562 S.W.2d 53 (1978).

- 3 Yim K. Cheung v. Wing Ki Wu, 2007 ME 22, 919 A.2d 619 (Me. 2007); Schettler v. RalRon Capital Corporation, 275 P.3d 933, 128 Nev. Adv. Op. No. 20 (Nev. 2012).
- 4 F.D.I.C. v. Notis, 602 A.2d 1164 (Me. 1992).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 110

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### Counterclaim, Recoupment, and Setoff

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#### VI. Practice and Procedure

##### C. Pleading

##### 3. Reply

## § 110. Reply to counterclaim

[Topic Summary](#) | [Correlation Table](#) | [References](#)

### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  167

### Forms

[Am. Jur. Pleading and Practice Forms, Counterclaim, Recoupment, and Setoff §§ 22 to 35 \(Reply\)](#)

[Am. Jur. Pleading and Practice Forms, Federal Practice and Procedure §§ 133 to 139 \(Reply\)](#)

Ordinarily, if the plaintiff does not reply,<sup>1</sup> the allegations of a setoff or counterclaim are taken as true.<sup>2</sup> In order to constitute a counterclaim that requires a reply, the pleading intended as a counterclaim must be designated as such,<sup>3</sup> and must state facts sufficient to sustain an independent cause of action.<sup>4</sup> Facts that serve merely to defeat the plaintiff's cause of action amount to a defense and not to a counterclaim requiring a reply,<sup>5</sup> even if there is a prayer for affirmative relief.<sup>6</sup>

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#### Footnotes

<sup>1</sup> [Dickerson v. Orange State Oil Co.](#), 123 So. 2d 562 (Fla. 2d DCA 1960); [Bliss v. East Coast Lumber Terminal, Inc.](#), 219 N.Y.S.2d 69 (Sup 1961).

<sup>2</sup> [Harman v. Yeager](#), 103 Utah 208, 134 P.2d 695 (1943).

- 3 Bohmfalk v. Vaughan, 89 Ariz. 33, 357 P.2d 617 (1960); Cooley Trading Co. v. Goetz, 247 A.D. 607, 288  
N.Y.S. 831 (4th Dep't 1936), *aff'd*, 273 N.Y. 488, 6 N.E.2d 417 (1936).
- 4 Zeman v. Mikolasek, 75 N.D. 41, 25 N.W.2d 272 (1946).  
As to the degree of specificity required in a counterclaim, see § 103.
- 5 Schussler v. Richards, 186 Misc. 963, 61 N.Y.S.2d 800 (Sup 1946); Zeman v. Mikolasek, 75 N.D. 41, 25  
N.W.2d 272 (1946).
- 6 Peterson v. Wisconsin River Power Co., 264 Wis. 84, 58 N.W.2d 287 (1953).

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## 20 Am. Jur. 2d Counterclaim, Recoupment, Etc. § 111

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### Counterclaim, Recoupment, and Setoff

Glenda K. Harnad, J.D.

#### VI. Practice and Procedure

##### C. Pleading

##### 3. Reply

### § 111. Setting up counterclaim in reply

[Topic Summary](#) | [Correlation Table](#) | [References](#)

#### West's Key Number Digest

West's Key Number Digest, [Pleading](#)  169

A counterclaim may be the subject of a reply in a proper case.<sup>1</sup> Even if, for reasons of clarity and practicality, it might be better to treat the plaintiff's counterclaim in reply as an amendment to the complaint, such a counterclaim is permitted, if it arises out of the same transaction that is the subject matter of the defendant's counterclaim and is therefore a compulsory counterclaim.<sup>2</sup> The compulsory counterclaim rule under the Federal Rules of Civil Procedure requires that the plaintiff's reply plead any counterclaim that the plaintiff may have that arises out of the same transaction or occurrence that is the subject of the defendant's counterclaim.<sup>3</sup> Using the words "pleadings" and "pleader" rather than "answer" and "defendant," the rule applies to plaintiffs as well as defendants.<sup>4</sup>

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#### Footnotes

- 1 [Warren v. Indian Refining Co.](#), 30 F. Supp. 281 (N.D. Ind. 1939); [Ivey v. Daus](#), 17 F.R.D. 319 (S.D. N.Y. 1955).
- 2 [Electroglas, Inc. v. Dynatex Corp.](#), 473 F. Supp. 1167 (N.D. Cal. 1979) (construing Fed. R. Civ. P. 13(a)). Permissive reply counterclaims are more properly considered amendments to complaints. [Hilliard v. Jacobs](#), 927 N.E.2d 393 (Ind. Ct. App. 2010).  
As to the failure to plead a compulsory counterclaim, see [§ 107](#).
- 3 [Mid-States Products Co. v. Commodity Credit Corp.](#), 10 F.R.D. 592 (E.D. Ill. 1949) (construing Fed. R. Civ. P. 13(a)).
- 4 [Bethlehem Fabricators v. John Bowen Co.](#), 1 F.R.D. 274 (D. Mass. 1940) (construing Fed. R. Civ. P. 13(a)).

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**20 Am. Jur. 2d Counterclaim, Recoupment, Etc. Correlation Table**

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**Counterclaim, Recoupment, and Setoff**

Glenda K. Harnad, J.D.

[Topic Summary](#)**Correlation Table****Counterclaim, Recoupment, and Setoff**

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